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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2064

ERIC WALDBAUM,
Petitioner,

v.

FAIRCHILD PUBLICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: June 27, 1980

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Petitioner Eric Waldbaum ("Waldbaum") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in Eric Waldbaum v. Fairchild Publications, Inc., No. 79-1407 (D.C. Cir.).

OPINIONS BELOW

The opinion of the Court of Appeals (set forth in Appendix A, 1a-25a) is not yet reported. The opinion of the United States District Court for the District of Columbia (set forth in Appendix B, 26a-50a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1980. This petition is filed within 90 days of that date. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case raises issues concerning the circumstances under which an individual suing in defamation for damage to his business reputation must prove "actual malice," as defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in the preparation of the allegedly defamatory article. The questions presented are:

1. Whether the Court of Appeals is correct that an individual who occupies an executive position in a business is a "public figure" and "assumes the risk" of false statements in the press unless he acts only as a "conduit for announcing and administering company policies made by others," or restricts his "vision ... to the balance sheet."

2. Whether, in determining if a person is a "public figure," a court may give determinative weight to any controversy as to which the court perceives the alleged defamation to be "germane" or "not wholly unrelated," despite this Court's rule in Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974), that a court must focus on "the particular controversy giving rise to the defamation."

3. Whether a court may find an individual to be a "public figure" without inquiring into whether he has the regular and continuing access to the media that would allow him to rebut any defamatory falsehood.

4. Whether a court can determine, as required by Gertz, supra, "the nature and extent of an individual's participation in [a] particular controversy" without inquiring into the nature and extent of the particular controversy itself.

CONSTITUTIONAL PROVISION

This case involves the First Amendment to the Constitution of the United States (U.S. CONST. amend. I):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Board of Directors of Greenbelt Consumer Services, Inc. ("Greenbelt"), a publicly-held consumer cooperative that operates supermarkets, furniture and gift stores, and discount gasoline stations, hired petitioner Waldbaum to be Greenbelt's president and chief executive officer in January, 1971, and removed him from these positions some five years later, on March 16, 1976. In an issue dated six days after Waldbaum's removal, Supermarket News, a weekly trade newspaper with a nationwide circulation directed at executives and others involved or interested in merchandising, particularly the supermarket industry, published an article that read, inter alia:

> GREENBELT OUSTS ERIC WALDBAUM
>
> Washington (FNS) [Fairchild News Service] -- Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.

> * * * [Greenbelt] has been losing money the past year and retrenching.[1]

Based on diversity jurisdiction, Waldbaum sued Respondent Fairchild Publications, Inc. ("Fairchild"), the publisher of Supermarket News,[2] in the United States District Court for the District of Columbia. Waldbaum contended that the statement that Greenbelt "has been losing money the past year and retrenching" had severely damaged his business reputation; that the statement was false because, in fact, Greenbelt had achieved record profits during the year

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1 The article is set forth in full in the opinion of the Court of Appeals. See App. A at 4a n.5.

2 Fairchild also published numerous other daily and weekly trade papers, such as American Metals Market, Daily News Record, Women's Wear Daily, Home Furnishings, Footwear News, Energy Users News, Electronic News, and Men's Wear. Shortly after the above article about Waldbaum was published, Fairchild merged into a wholly-owned subsidiary of Capital Cities Communications, Inc., a media conglomerate.

to which the article referred and was not retrenching; and that the article therefore was libelous and he should recover damages.

Fairchild moved for judgment on the pleadings on the ground that Waldbaum had failed to state a claim upon which relief could be granted. The district judge denied the motion, stating that the article was "reasonably susceptible" to a defamatory interpretation, and that it was for the jury to determine both "whether the defamatory sense was the one conveyed" and whether "the defamatory imputation, if in fact conveyed, prejudices [Waldbaum] in his business, profession, or trade."[3]

On the completion of discovery, Fairchild moved for summary judgment on the ground that Waldbaum was a public figure and there was no evidence of the "actual malice" required by New York

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3 Order dated July 7, 1977; Motion of Defendant Fairchild for Reargument and Reconsideration denied by Order dated August 8, 1977.

Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny.

The district court granted Fairchild's motion in an opinion written before this Court's decisions in Hutchinson v. Proxmire, 443 U.S. 111 (1979), and Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 151 (1979). The district judge concluded that Waldbaum was not a "public figure for all purposes" within the meaning of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), but that he was a "limited public figure" as the district judge conceived such a figure under Gertz, Time, Inc. v. Firestone, 424 U.S. 448 (1976), and subsequent lower court decisions. Summary judgment was appropriate, according to the district judge, because the Supermarket News article "was fair comment on Waldbaum's performance and departure from Greenbelt," and Waldbaum admitted he could not prove "actual malice" in its preparation. App. B at 50a.

The Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. Although

the decision of the court of appeals was issued after this Court issued its decisions in Hutchinson, supra, and Wolston, supra, the court of appeals stated that "[u]nfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private figures enunciated in Gertz." App. A at 8a. On the ground that courts are required "to articulate clear standards that can guide both the press and the public," id., the court of appeals set out its own three-step process for the examination of the issue in this case, namely, how to determine when a person has become a "limited public figure" in connection with a defamatory article.[4]

First, said the court of appeals, "the court must isolate the public controversy." App. A at 16a. An issue would be a public controversy if it "was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants." App. A at 19a.

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4 Fairchild conceded on appeal that Waldbaum was not a public figure for all purposes. See App. A at 21a.

Next, a court "must analyze the plaintiff's role in [the controversy]." App. A at 19a. A plaintiff could be a public figure in a particular controversy if he was "purposely trying to influence [its] outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." Id.

As to the third step in its analytical framework, the court of appeals stated the following:

> Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive the New York Times protection. App. A at 20a.

The court of appeals then attempted to apply its theoretical framework to the facts of this case.

In support of its motion for summary judgment, Fairchild had submitted thirty-one newspaper clippings, from Supermarket

News and the Washington Post, published over a period of eight years. Only eleven of the articles mention Waldbaum. One of those is the allegedly defamatory article itself, while another was published five months after that article. Of the other nine, one is a Supermarket News article covering Waldbaum's hiring by Greenbelt, and most of the others involve routine announcements of Greenbelt's financial results. No article published within eighteen months before the alleged defamation mentions Waldbaum.[5]

In response to Fairchild's motion, Waldbaum had submitted an affidavit in which he stated, inter alia, that he could recall neither any press release of Greenbelt that had him as its subject (other than the one in 1971 announcing his appointment) nor any article focusing on him or mentioning him other than in

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5 The nine articles that mention Waldbaum and were published before the defamation have been reproduced in Appendix C, 51a - 64a.

his role as chief executive of Greenbelt; that Greenbelt's Board charged him to take public positions on behalf of Greenbelt on consumer issues, and all of his statements to the press were on behalf of Greenbelt in fulfilling his responsibilities; that the Board also required him to communicate with Greenbelt's shareholders, which he did by submitting articles on subjects of interest to shareholders in a monthly newsletter; and that he did not receive any communication from the news media after being removed by Greenbelt.

Fairchild also had submitted in support of its motion the deposition of its Washington bureau chief. In that deposition, in response to questioning from Fairchild's own counsel, the bureau chief stated that the allegedly defamatory article had been "buried on page 35" of a 40-page edition, "[b]ecause it did not have the standing in terms of news importance that many of the other stories in the paper had," and because "it is a basic, routine executive change story."[6]

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6 In its brief to the court of appeals (at p. 7), Fairchild noted that

On the basis of a record that included this material,[7] the court of appeals concluded that Waldbaum was a "public figure" for purposes of the allegedly defamatory article.

First, the court stated its "belief" that public controversies, as it had defined the concept, supra at 9 , existed "over the viability of cooperatives

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(Footnote continued)
Supermarket News "covers every facet of the supermarket industry in this country," including "changes in executives." The portion of the bureau chief's deposition from which the statements in the text are excerpted is reproduced in Appendix D to this petition.

7 The other materials in the record were affidavits of the reporter who wrote the allegedly defamatory article and of Fairchild's Washington bureau chief, a copy of an edition of Greenbelt's monthly newsletter to its shareholders, Waldbaum's deposition, filings of Greenbelt before the Securities and Exchange Commission, Greenbelt's press release announcing Waldbaum's dismissal, and the complete edition of Supermarket News containing the allegedly defamatory article.

as a form of commercial enterprise and over the wisdom of various policies that Greenbelt in particular was pioneering." App. A at 22a.[8]

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8 The court did not allude to anything in the record showing that "the viability of cooperatives as a form of commercial enterprise" was being "debated publicly" before the allegedly defamatory article, as required by the court of appeals' definition of public controversy. See App. A at 19a. As for policies that Greenbelt supposedly was pioneering, the court mentioned "unit pricing, open dating, and highly competitive advertising." App. A at 22a.

Fairchild submitted only two articles into the record that mentioned unit pricing, both published more than five years before the alleged defamatory article. The first article, published two months before Waldbaum joined Greenbelt, noted that Greenbelt already had introduced unit pricing in its stores and, of course, did not mention Waldbaum. The second article reported Waldbaum's appointment by Greenbelt, noted that he had been involved in his past employer's decision to use unit pricing and in the decision to accept unit pricing by the commercial supermarket chains in New York. App. C at 51a-52a. (Prior to joining Greenbelt, Waldbaum had held various executive positions with commercial companies involved in

The court next looked to Waldbaum's role in these "admittedly overlapping controversies." Id. It concluded "that Waldbaum had thrust himself into" these controversies. The court reached this conclusion on the basis of the following: (1) "Waldbaum was known as a leading advocate of certain precedent-breaking

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(Footnote continued)
supermarket and other merchandising activities).

Only two articles in the record refer to open dating: the first, the article reporting Waldbaum's appointment by Greenbelt in 1971, which stated that Waldbaum "favors" open dating (see App. C at 52a), and the second an article also published in 1971, two months after Waldbaum joined Greenbelt, reporting that Greenbelt intended to implement a program of open dating. Both of these articles appeared five years before the allegedly defamatory article; the second does not even mention Waldbaum.

Only two articles in the record, both published four years before the alleged defamation, refer to any competitive advertising by Greenbelt, and only one of these mentions Waldbaum, who is quoted for a statement of fact. See App. C at 55a-58a.

policies before coming to Greenbelt," id.; and (2) at Greenbelt, "he pursued these policies and other consumer-oriented activities" by approving the content of Greenbelt's monthly newsletter to shareholders, acting on his view that "educating the community at large was one function of a cooperative such as Greenbelt," and being "the mover and shaper of many of the cooperative's controversial actions." App. A at 22a-24a.

The court of appeals felt that Waldbaum "assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management," which was the subject of the alleged defamation. App. A at 25a. The court of appeals considered it relevant that "[a]lthough he personally was not frequently the subject of articles," Waldbaum "had prior dealings with the media," and "was somewhat familiar with press operations and had held press conferences to discuss Greenbelt's policies and operations." Id. Based on "the overall picture," the

court concluded "that Waldbaum was a public figure for the limited purpose of comment on Greenbelt's -- and his own -- innovation policies," and that "comment on his termination as president and chief executive officer of Greenbelt falls within the range of reports protected under New York Times." Id.

REASONS FOR GRANTING THE WRIT

In an Area in Which "Unintended Inexorability" Is a Constant Danger, This Decision Conflicts with This Court's Decisions in Four Respects, All of Which Cause Such Inexorability

Since its landmark decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court has proceeded cautiously and deliberately in delineating the necessary accommodation between the individual's interest in reputation and society's interest in "breathing room" for factual statements about certain persons. The care with

which the Court has proceeded in this area evidences its continuing awareness of the danger first noted by Justice Harlan in his plurality opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), in which he cautioned against attributing to this new development in the law of defamation "an unintended inexorability," and emphasized the necessity to consider "'the factors which arise in the particular context.'" 388 U.S. at 148, quoting Time, Inc. v. Hill, 385 U.S. 374, 390 (1967). That the Court is still aware of the danger of "an unintended inexorability" is clear from its reversal in Hutchinson and Wolston of decisions in which two courts of appeals had taken the concept of "public figure" well beyond this Court's statement in Gertz that persons might become public figures by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," 418 U.S. at 345.

The present case represents another, even more dangerous, departure from this Court's decision in Gertz. Justifying

itself on the ground that "[u]nfortunately, the Supreme Court has not yet fleshed out the skeletal description of public figures announced in Gertz," the court of appeals laid out its own extensive analytical framework for the guidance of "both the press and the public." App. A at 8a.

The analytical approach of the court of appeals conflicts with the principles stated in Gertz, Hutchinson, Wolston, and other cases in at least four significant respects.

First, it is clear from this Court's decisions that a "public controversy" requires something more than a general public interest in a subject. This Court has indicated what might constitute a "public controversy" in two cases. In Associated Press v. Walker, 388 U.S. 130 (1967), there was a public controversy over the attempt of the first black student to integrate the all-white University of Mississippi. See Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). In Gertz, there was a public controversy over a policeman's killing of

a youth, which resulted in both criminal and civil proceedings against the policeman. These are "public controversies" under anybody's definition, as they are clearly defined issues on which passions on both sides could run high and which the press could be expected to cover in detail, in depth, and continuously. In Hutchinson, on the other hand, this Court stated that an issue like expenditure of public funds was not a public controversy. See 443 U.S. at 135.

The description of "public controversy" laid down by the court of appeals flouts Hutchinson. The expenditure of public funds is "debated publicly" and "has foreseeable and substantial ramifications," see App. A at 19a, but this Court in Hutchinson expressly found that concern about the expenditure of public funds is not a public controversy. Moreover, as shown by its application to the facts of this case, the definition of the court of appeals would result in the finding of a "public controversy" in every trade journal discussion of par-

ticular commercial practices or forms of enterprise. Nothing in this Court's treatment to date of the concept of "public controversy" suggests that it is so expansive.[9]

In addition, in applying its definition of "public controversy" in this case, the court of appeals has indicated that lower courts are free to disregard this Court's admonition that the record must establish and define a controversy. This Court emphasized in both Wolston and Hutchinson the necessity for rigorous delineation of the "public controversy." 443 U.S. at 166 n.8; 443 U.S. at 135. And in Gertz, this Court emphasized that a court must examine the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352; see also Wolston, 443 U.S. at 167. Such an examination would require that the scope,

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9 See also Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 n.8 (1979).

nature, and timing of the controversy be shown by the record, for otherwise the "nature and extent" of the plaintiff's role cannot be determined. The court of appeals in this case, however, made no attempt to delineate any "particular controversy." Its discussion on the point amounts to a statement of its "belief" that controversies existed over a melange of issues, with no effort to tie its "belief" to the record - which does not show the existence of "controversies" even under the court of appeals' new and expansive definition of the term. See supra at n.8.

The second respect in which the court of appeals' analytical method conflicts with the principles stated by this Court is the court of appeals' statement that a person could be considered to have "thrust [himself] to the forefront" of a controversy, as required by Gertz and Wolston, see, e.g., 443 U.S. at 166, on a finding of nothing more than that he "could realistically have been expected, because of his position in the controversy, to have an impact on its

resolution." App. A at 19a. To the extent that Waldbaum became involved in any controversy that might be found in this record, he did so only in fulfillment of obligations imposed on him by Greenbelt's Board of Directors and as a consequence of his employment. See supra at 11. Gertz indicates that this Court does not intend for a person to be deemed to have "voluntarily thrust" himself into a controversy if his only connection with the controversy is to represent his employer and to fulfill an obligation of his livelihood, even if in doing so he could be expected "to have an impact on [the] resolution" of the controversy. And it is obvious that many persons might "have an impact" on a controversy but not be at the "forefront" of the controversy as required by Gertz. Waldbaum should no more be considered to have thrust himself to the forefront of a controversy than should a lawyer representing a client.[10]

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10 As this Court noted in Gertz, Gertz's participation in the coroner's inquest "related solely to his representation of a private client." 418

Third, the court of appeals has completely warped the concept of "the particular controversy" relevant to an analysis of whether a person is a "public figure." In Gertz, this Court stated that a court must examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352 (emphasis supplied). The court of appeals stood the criterion on its head, and would ask only whether the subject matter of the alleged defamation could be considered "germane" to an evaluation of the plaintiff's participation in any controversy.[11]

(Footnote continued)
U.S. at 352. Moreover, as Mr. Chief Justice Burger noted, Gertz "was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client." 418 U.S. at 355 (dissenting on other grounds).

11 This shift by the court of appeals away from this Court's approach in Gertz was essential to its holding.

Finally, the court of appeals' approach in this case conflicts with the principles set forth in this Court's decisions by ignoring the fact that Waldbaum had no special access to the media as an individual. The fact that Waldbaum was, in the words of the court of appeals, "somewhat familiar with press operations," falls far short of the access required for meaningful self-help to counter a defamation, and the record shows that the news media were not interested in Waldbaum's view concerning the allegedly defamatory article. See supra at 12 . Yet from its genesis in Curtis Publishing Co. v. Butts, supra, one of

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(Footnote continued)
The allegedly defamatory article did not indicate that its subjects, Waldbaum's dismissal and the operations and profitability of Greenbelt during the preceding year, were the subject of public controversy, nor does the record. Instead, the court of appeals suggested those subjects were "germane," or not "wholly unrelated to" an evaluation of the plaintiff's stance on supposed "public controversies" to which the article did not even allude.

"public figure" has been a public figure's regular and continuing access to the media.[12] Such access is fundamental to the distinction between public and private figures. As this Court stated in Gertz, the "[f]irst remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." 418 U.S. at 344. In this case, the court of appeals has indicated that the absence of any opportunity for self-help is irrelevant.

The startling consequence of the way in which the court of appeals has

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12 See, e.g., Hutchinson, 443 U.S. at 136: "... regular and continuing access to the media ... is one of the accouterments of having become a public figure;" Wolston, 443 U.S. at 164: "[w]e explained that the rationale for extending the New York Times rule to public figures was two-fold;" id. at 170 (Blackmun, J., concurring) (noting "these two public-figure characteristics").

"fleshed out the skeletal descriptions of public figures and private persons enunciated in Gertz" is that under the test of the court of appeals, Gertz would have been covered by the New York Times standard. Gertz had considerable stature as a lawyer, author, lecturer, and participant in matters of public import; he had served on housing committees appointed by the mayor of Chicago, was active in community and professional affairs as an officer of local civic groups and various professional organizations, and had published several books and articles on legal subjects. 418 U.S. at 330 n.3, 351. Consequently, he was "well known in some circles." 418 U.S. at 351. Undoubtedly, a person so involved in public affairs was involved in issues that were "being debated publicly" and that "had foreseeable and substantial ramifications for nonparticipants." See App. A at 19a. And the statements on which Gertz based his libel suit -- that he had a criminal record, was a Communist sympathizer and member of various "leftist" organizations, and was the archi-

tect of a frame-up in the criminal prosecution of a policeman -- certainly would be "germane" to Gertz's participation in any public controversy and "relevant to the public's decision whether to listen to him." See App. A at 20a.[13] The only way to reconcile the holding in Gertz with the holding of the court of appeals in this case is to conclude that a lawyer representing a client receives from the judicial system a special protection against defamation not available to a businessman representing a company.

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13 Indeed, the allegation that Gertz was an architect of a frame-up of a policeman in a criminal prosecution was surely "germane" to Gertz's participation in the related civil suit, which he had entered voluntarily as counsel, yet in Gertz this Court distinguished between the criminal and civil suits: only the former gave rise to the defamation, and Gertz "plainly did not thrust himself into the vortex of this public issue...." 418 U.S. at 352.

Certiorari Should Be Granted To Avoid Allowing This Decision to Become the Guidance for Other Courts, and To Avoid Certain Immediate, Far-Reaching and Pernicious Effects

Of course, this Court cannot grant certiorari in every case in which a court of appeals departs from the principles in this Court's previous cases. There are three reasons, however, why this Court should grant certiorari in this case. First, in this area it would be easy for the lower courts to give to the extension of the New York Times standard to new situations the "unintended inexorability" against which Justice Harlan cautioned, and any of the court of appeals' departures from this Court's decisions would contribute to such an inexorable extension. Second, the court of appeals expressly set itself up as announcing guidelines for other courts to follow. Because this Court's description of the so-called "limited public figure" does remain "skeletal," as the court of appeals noted, the guidelines established by the court of appeals are certain to

influence other courts.[14] And third, as discussed below, there are two aspects of the court's decision that, if permitted to stand, could have immediate, far-reaching, and pernicious consequences.

First, despite this Court's prohibition of subject-matter classifications in this area, see Hutchinson, 443 U.S. at 135; Time, Inc. v. Firestone, 424 U.S. at 456, a prohibition of which the court of appeals was aware, see App. A at 24a n.36, the court of appeals has established an analytical framework within which every modern business executive will be found to be a public figure.

The court of appeals based its finding that Waldbaum was a public figure on Greenbelt's being "an innovative company often the subject of news reports," and on Waldbaum's being the "mover and shaper" of Greenbelt's

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14 See, e.g., "Standards Set Out for Determining 'Public Figures' in Libel Actions," 48 U.S.L.W. 1153 (April 8, 1980) (front-page treatment of court of appeals decision as "moving in where the U.S. Supreme Court left off in Gertz ...").

policies and his personally approving information in the company's newsletter to shareholders. App. A at 22a, 24a. Reliance on factors such as these gives the lie to the court's attempted disclaimer that "[b]eing an executive within a prominent and influential company does not by itself make one a public figure." App. A at 23a. Every company is "innovative" to some extent within its field, and every company, like Greenbelt, will be the subject of news reports in its trade journals and local newspapers intermittently over the space of several years. Moreover, companies hire executives with the expectation, indeed the requirement, that they will "move and shape" the companies' actions, and Waldbaum's attention to the newsletter differs not a whit from every good executive's attention to, for example, proxy statements or annual reports to shareholders.[15]

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15 Waldbaum stated in his affidavit, submitted in opposition to summary judgment, that Greenbelt was virtually in continuous registration before the

A corporate executive having policy-making responsibility will invariably, in the course of fulfilling his employment obligation, be quoted at some point on some matter that "was being debated publicly and ... had foreseeable and substantial ramifications for non-participants." App. A at 19a. Since the court of appeals has set a test that treats any comment about the successfulness of an executive's enterprise or about an executive's termination to be "germane" to any such controversy, every corporate executive has become fair game for defamation of business reputation. And the defamation is most likely to occur, as it did to Waldbaum, at a time when the executive is most vulnerable to damage, having just become unemployed, and in a publication having the most power to inflict damage - a trade news-

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(Footnote continued)
Securities and Exchange Commission, and that his concern with the content of the newsletter was based on the necessity of avoiding misleading statements.

paper directed at the executive's peers and potential employers.

The danger and illogic of its analysis is especially apparent in the effort by the court of appeals to describe how some corporate executives might still escape public figure status after the decision below:

> In many cases, a corporate official is simply a conduit for announcing and administering company policies made by others. Similarly, executives who do make corporate policy do not thereby take stands in public controversies. These descriptions, however, do not fit Eric Waldbaum at Greenbelt. ...."[H]e did not become merely a boardroom president whose vision was limited to the balance sheet." App. A at 24a, quoting, in part, the district court.

The formula for the executive who would avoid becoming a public figure is clear: either be nothing more than a mouthpiece for the policy made by other executives, or play a Machiavellian role behind the scenes. Needless to say, the court of appeals' role model for the executive is

a prescription for disaster in the modern world of government regulation, interest groups, and pervasive news media. What sort of judicial miasma would protect the nineteenth-century "boardroom president whose vision was limited to the balance sheet," while stripping the normal protection of the law from today's real-life corporate executives who must shape and defend corporate policies?

The court of appeals prefaced the discussion of its analytical approach to this case with the statement that "society must provide the individual with clear rules" to enable him "to calculate correctly ... the effect that undertaking some activity will have on the legal recourse available to him should he suffer injury due to defamation by the press." App. A at 9a-10a. The court of appeals' analytical method has provided such rules, but those rules conflict with the principles in this Court's previous cases, and would create prohibited subject-matter classifications and unduly

restrict the scope of action of private figures.[16]

The second aspect of the court of appeals' decision that will have immediate, far-reaching, and pernicious consequences if allowed to stand is its complete departure from this Court's requirement that courts look to "the particular controversy giving rise to the defamation," see Gertz, 418 U.S. at 352. The implication of the court of appeals' new "germaneness" test is staggering.[17]

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16 The court of appeals' approach could easily be extended to make "public figures" of lawyers, college professors, and members of other professions in addition to business executives.

17 The test of "germaneness" was lifted from the vastly different context of statements concerning a public official. See App. A at 20a n.33. In that context, this Court has suggested that the test is justified by "the paramount public interest in a free flow of information to the people concerning public officials, their servants." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). See Gertz, 418 U.S. at 344-345. There is no similar paramount public interest in statements about virtually all aspects of the life of an otherwise

In essence, it means that the otherwise private person who becomes a public figure in a particular controversy loses the normal protections of the law of defamation for virtually any statement about him or her. The court of appeals

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(Footnote continued)
private person who has, voluntarily or involuntarily, become embroiled in a single, perhaps passing, public controversy. The obvious theoretical underpinning for the "paramount public interest" in free discussion of a public official is that official's power and influence in many controversies covering many aspects of the public life. In the context of a single public controversy, on the other hand, there is no "paramount public interest" in a dissection of the lives of all private persons who, for whatever reason, have become embroiled in that controversy. The public interest is in the controversy itself, and that interest can be met by protecting the free flow of information concerning each participant's role in and views concerning that controversy. There is no legitimate interest in protecting with the New York Times standard the dissection by the press of the entire life of every participant for the ostensible purpose of casting some light on the worth of that person's contribution to the controversy.

implied that the areas "germane" to the decision on whether to credit a person's views on a controversy would be areas like that person's "talents, education, experience, and motives." App. A at 20a. That is already an exceedingly broad wedge into a person's life and covers the areas in which a person is most vulnerable to defamation.[18] But there is no constitutionally acceptable basis on which to cabin the initial "germaneness" determination to anything approaching the four areas listed by the court. To a substantial segment of the population even the most intimate details of a person's private life -- for example, the person's sexual preference -- are "ger-

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18 The intrusion is made even greater by the court's application of its test in this very case: the logic of the court's holding is that Waldbaum's "talents" are "germane" to the public's decision on whether to credit his views on the controversies identified by the court, and that the profitability of his business is "germane" to the issue of his "talents." Obviously, the "germaneness" standard, as applied in this case, is infinitely malleable and expansive.

mane" to a decision on whether to credit that person's views on public controversies. The courts cannot draw the line at such private details without engaging in the kind of value judgment on matters meriting public concern that have been eschewed by this Court. See, e.g., Gertz, 418 U.S. at 346. The inevitable result of the court of appeals' "germaneness" test is a head-on collision between the First Amendment as represented by the New York Times-Gertz line of analysis, and the legitimate privacy interests of the limited public figure. Nothing in this Court's cases requires such a collision, and this Court should not leave unreviewed a decision that makes one inevitable.

The full effect of the court of appeals' new "germaneness" standard becomes clear when one realizes that Supermarket News would have published the allegedly defamatory article in exactly the same form even if Eric Waldbaum had been the kind of "boardroom executive" whom the court of appeals suggested would not be a public figure. The article was

not published because of Waldbaum's particular activities at Greenbelt, or because of Greenbelt's special stature, if any, in the industry; as stated by the paper's Washington bureau chief, the article was published simply because it was Supermarket News' business to cover executive shifts. See App. D. In other words, under the court of appeals' new test, a defamatory statement gains the protection of the New York Times standard even though its publication was not occasioned in any way by the status of the defamed person as a public figure. This result completely rips the New York Times standard, as explicated in Gertz, from its theoretical moorings; if allowed to stand, it will mean that the "inexorable extension" against which Justice Harlan cautioned is upon us.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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June 27, 1980

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1407

ERIC WALDBAUM, APPELLANT

v.

FAIRCHILD PUBLICATIONS, INC.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 76-1810)

Argued January 9, 1980

Decided March 31, 1980

Judgment entered
this date

Lowell D. Turnbull, with whom *Richard P. Shlakman* was on the brief, for appellant.

Henry J. Formon, Jr., for appellee.

Before TAMM and MACKINNON, *Circuit Judges*, and HAROLD H. GREENE,* *United States District Judge for the District of Columbia.*

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: In this action we must determine when an individual not a public official has left the relatively safe harbor that the law of defamation provides for private persons and has become a public figure within the meaning of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). After examining affidavits and exhibits submitted by the parties, Judge Howard F. Corcoran of the United States District Court for the District of Columbia concluded that the plaintiff was a limited public figure under *Gertz*. Because the plaintiff admitted that he could not prove "actual malice" on the part of the defendant, which *Gertz* requires public figures to do, Judge Corcoran entered summary judgment for the defendant. Having reviewed the facts in light of the criteria that govern the status of a defamation plaintiff, we agree with Judge Corcoran's decision and affirm.

I.

Although the parties in this case differ over how to classify the plaintiff, they fundamentally agree on the underlying facts. Eric Waldbaum, the plaintiff, became president and chief executive officer of Greenbelt Consumer Services, Inc. (Greenbelt) in January of 1971. Greenbelt is a diversified consumer cooperative that, during Waldbaum's tenure, ranked as the second largest cooperative in the country.[1]

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] When Waldbaum left as Greenbelt's president, the cooperative had approximately 38,500 members. The company owns retail supermarkets (Co-op Supermarkets), furniture and gift outlets (SCAN stores), and automobile service stations (Exval stations).

While serving as Greenbelt's president, Waldbaum played an active role not only in the management of the cooperative but also in setting policies and standards within the supermarket industry. He battled the traditional practices in the industry and fought particularly hard for the introduction of unit pricing and open dating in supermarkets.[2] He held several meetings, to which press and public were invited, on topics varying from supermarket practices to energy legislation and fuel allocation. He pursued a vigorous policy of consolidating Greenbelt's operations to eliminate unprofitable outlets. These actions generated considerable comment on both Greenbelt and Waldbaum in trade journals and general-interest publications.[3]

On March 16, 1976, Greenbelt's board of directors dismissed Waldbaum as the cooperative's president and chief executive officer. *Supermarket News*, a trade publication owned by the defendant, Fairchild Publications, Inc. (Fairchild),[4] ran an item on Waldbaum's ouster on page 35 of its March 22 issue. The five-sentence article stated

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[2] Waldbaum had been a leading advocate of unit pricing when he was a vice president of Hill's Supermarkets in New York. *See* Supplemental Appendix (Supp. App.) at 320.

[3] The defendant, Fairchild Publications, Inc., appended 31 newspaper clippings from its trade publication, *Supermarket News*, and from *The Washington Post* to its motion for summary judgment. Of these, 22 appeared while Waldbaum was president (or in conjunction with his hiring and termination); 10 of them mentioned Waldbaum by name in connection with his becoming and leaving as president, Greenbelt's financial status, the cooperative's criticisms of competitors in advertising, and its effort to enter into oil exploration. *See* Appendix (App.) at 83-126; Supp. App. at 316-31.

[4] Capital Cities Media, Inc., a wholly owned subsidiary of Capital Cities Communications, Inc., succeeded Fairchild by merger in 1976. For convenience, however, we shall refer to the defendant as "Fairchild."

at one point that Greenbelt "has been losing money the last year and retrenching." Supplemental Appendix (Supp. App.) at 328.[5]

On September 27, 1976, Waldbaum filed a libel action in the district court based upon this comment in the article.[6] He contended that in fact Greenbelt had not been losing money or retrenching and that this allegedly false report damaged his reputation as a businessman. Waldbaum sought actual and exemplary damages totalling $75,000.

After discovery, Fairchild moved for summary judgment. It argued that Waldbaum was a public figure and, because he had admitted the absence of "actual malice," he could not recover damages for defamation. Waldbaum countered that he was not a public figure and thus would have to prove only negligence on the part of Fairchild in researching and publishing the article. On February 15,

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[5] The story in its entirety read:

GREENBELT OUSTS ERIC WALDBAUM

WASHINGTON (FNS) — Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.

Rowland Burnstan will serve as acting chief executive office[r] until a new president is named. Burnstan, an independent management consultant and economist, has worked for various Government agencies and businesses.

Greenbelt said part of his interim job will be to locate a new president for the co-op, which has been losing money the past year and retrenching.

Waldbaum had served as president since 1971. His plans are not known.

Supp. App. at 328.

[6] Waldbaum originally included Greenbelt and one of its directors, Bruce D. Patner, as defendants. At Waldbaum's request, however, the district court dismissed with prejudice the counts against Greenbelt and Patner on March 28, 1977.

1979, Judge Corcoran granted Fairchild's motion. He concluded that although Waldbaum could not be considered a public figure for all purposes, he was a public figure for the limited range of issues concerning "Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position." *Waldbaum v. Greenbelt Consumer Services, Inc.*, Civ. No. 76-1810, at 15 (D.D.C. Feb. 15, 1979) (memorandum and order granting Fairchild's motion for summary judgment), *reprinted in* Appendix (App.) at 150, 164. Waldbaum now appeals.[7]

II.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that certain rules of law historically applied in defamation cases impinge upon the first amendment's guarantee of freedom of the press. Specifically, the Court announced that a public official may not recover in a defamation action absent a showing "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. Subsequently, the Court applied the same standard to public figures. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

These rulings balance the competing interests of the public, the press, and the individual. From its earliest days, the law of defamation made the individual's interest in his reputation supreme. Beginning with *New York Times*, however, the Court recognized the hard reality that society must afford a certain amount of "strategic protection" to defamatory statements to avoid chilling

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[7] Fairchild concedes that Judge Corcoran was correct in ruling that Waldbaum was not a public figure for all purposes. It argues before us that Waldbaum was a public figure for limited purposes that include the statements made in the March 22, 1976, article.

the dissemination of truth and opinions. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342. Thus, these decisions do not insulate the defamer because of the value of his message as such. Rather, they give the media "breathing space" to ensure "that debate on public issues [is] uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. at 270, 272, while accommodating the conflicting need of the individual to redress wrongful injury to his reputation. *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2687 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342.

In *Gertz*, decided in 1974, the Court focused on the public or private status of the plaintiff in determining how to protect simultaneously individual reputation, freedom of the press, and public debate. It found that a private individual has little means of redressing a defamatory statement except by legal action. *See id.* at 344. It therefore held that a state may allow a private person to recover for defamation under any standard, as long as that standard does not impose liability without fault. *Id.* at 347.

This balance shifts, however, when one turns from private persons to public officials or figures. First, those who enter the public spotlight have greater access to the media to correct misstatements about them, as shown by their preexisting media exposure. *Id.* at 344.[8] More important, in "assum[ing] special prominence in the resolution of public questions," *id.* at 351, public figures

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[8] Having access to the press does not always alleviate the injury caused by defamation. The Court in *Gertz* stated:

> Of course, an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

418 U.S. at 344 n.9.

"invite attention and comment," *id.* at 345. They thus accept the risk that the press, in fulfilling its role of reporting, analyzing, and commenting on well-known persons and public controversies, will focus on them and, perhaps, cast them in an unfavorable light. *See id.* at 344-45.[9] Although these generalities may not fit every situation exactly, they draw a relatively clear line for the press to follow. *See id.* at 345. [10]

In trying to define who is a public figure, the Court in *Gertz* created two subclassifications, persons who are public figures for all purposes and those who are public figures for particular public controversies. An individual may have attained a position "of such persuasive power and influence," *id.*, and of "such pervasive fame or notoriety," *id.* at 351, that he has become a public figure in all situations. This test is a strict one. The Court stated flatly that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 352. *Accord, Wolston v. Reader's Digest Association*, 99 S. Ct. 2701, 2706 (1979).

The Court in *Gertz* acknowledged freely that under this definition the general public figure is a rare creature. More common are persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. Put slightly differently, this limited-purpose public figure is "an individual [who] voluntarily injects

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[9] The Court in *Gertz* stated that, at least in theory, a person can become a public figure involuntarily. Such instances, the Court nevertheless noted, are rare. *See id.* at 345. For a discussion of involuntary public figures, see note 18 *infra.*

[10] For a discussion of the importance of how clearly this line is drawn, see pp. 8-10 *infra.*

himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." *Id.* at 351. The relevant examination turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

III.

Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. The very purpose of the rule announced in *New York Times*, however, requires courts to articulate clear standards that can guide both the press and the public. From analyzing *Gertz* and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity"—his name a "household word"—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.

A.

The Supreme Court acknowledged in *Gertz* that the peculiar circumstances of each case affect the balance between freedom of the press and an individual's interest in his reputation. *See* 418 U.S. at 343. The Justices nevertheless eschewed analyzing a person's status as a public figure case by case: a purely ad hoc approach, though perhaps more accurate in its final outcome, "would lead to unpredictable results and uncertain expectations . . . ." *Id.* Instead, courts should formulate "broad rules

of general application" that accommodate the competing interests of press and personal reputation. *Id.* at 343-44. Of course, litmus tests that define what is and is not protected and that the press, the public, and the courts could apply with perfect consistency and accuracy would reduce the need for the "breathing space" that *New York Times* creates. Unfortunately, we do not have such tests. Until we find them, we must search for more precise articulations of all aspects of the *New York Times* rules, realizing that the more certain our determinations become the less need there is to extend first amendment safeguards to matters that do not merit those safeguards on their own account.

Clear guidelines are important, first, for the press. As noted above, the entire scheme of "strategic protection" for certain defamatory statements rests not on the inherent value of those statements but instead on the need to avoid chilling the dissemination of information and ideas that are constitutionally protected for their own sake. *See* pp. 5-6 *supra*. Because the outcome of future litigation is never certain, members of the press might choose to err on the side of suppression when trying to predict how a court would analyze a news story's first amendment status. Questionable areas thus receive prophylactic protection to ensure that the press will not refrain from publishing material that has value under the first amendment due to its own content.

Precision also is important to members of the public generally, any one of whom might become the subject of a press defamation. Our society always has encouraged citizen involvement in public affairs. The fear of no redress for injury to reputation may deter an individual from engaging in some course of conduct that a court later might find to have altered his status.[11] Similarly,

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[11] As the Supreme Court observed in *Gertz*, "We should not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all pur-

a person desiring to voice his views on public issues may not wish to have some aspects of his private life exposed and therefore may refrain from entering the public arena. To guard against these possibilities, society must provide the individual with clear rules that govern the potential consequences of his participation in public life. Clarity allows him to calculate correctly, and not overestimate or underestimate, the effect that undertaking some activity will have on the legal recourse available to him should he suffer injury due to defamation by the press.

B.

Given these considerations, a court [12] analyzing whether a given plaintiff is a public figure must look at the facts, taken as a whole, through the eyes of a reasonable person. This objective approach should enable both the press and the individual in question to assess the individual's status, in advance, against the same yardstick. Focusing on what a reporter, editor, or publisher actually knew or believed could introduce subjective elements that are difficult to prove and even more difficult to predict. Such

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poses." 418 U.S. at 352. Democracies should avoid deterring citizen involvement in public affairs. *Gertz* implicitly furthers this policy by making public figures only those who are extraordinarily prominent and pervasively involved in public matters or who, in particular instances, have become integrally involved in the disposition of particular public controversies —and then only for purposes related to those controversies. *See generally* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1199-200 (1976); 48 TEMP. L.Q. 450, 460 (1975).

[12] Whether the plaintiff is a public figure is a question of law for the court to resolve. Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 429 (D.C. Cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2701 (1979). *See* Rosenblatt v. Baer, 383 U.S. 75, 88 (1966).

a perspective would give the individual little opportunity to alter his conduct or lifestyle to preserve his anonymity. Similarly, looking only to what the individual thought would charge the press with discovering and evaluating the inner beliefs and peculiarities of particular individuals and thus would deprive the media of the very "breathing space" that *New York Times* sought to create and protect. Resolving these questions based upon what a reasonable person, looking at the entire situation, would conclude allows the press and the individual to evaluate public-figure status against a single, discoverable norm and from there to act as they see fit, understanding the consequences of their conduct under *New York Times*.[13]

C.

With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. *Gertz*, as noted above, held that a plaintiff could be found to be a general public figure only after a clear showing "of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." 418 U.S. at 352. He must have assumed a "role of especial prominence in the affairs of society . . . ." *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976). *Accord, Wolston v. Reader's Digest Association*, 99 S. Ct. 2701, 2706 (1979). In other words, a general public figure is a well-known "celebrity," his name a "household word." [14] The public recognizes him and fol-

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[13] *Cf.* Note, *supra* note 11, at 1204-05 (plaintiff is a public figure when he *appears* prominent). *See also* Gertz v. Robert Welch, Inc., 418 U.S. at 345 ("media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk").

[14] *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 222-23 (1976); Note, *supra* note 11, at 1209.

lows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.[15]

As a general rule, a person who meets this test has access to the media if defamed. The public's proven preoccupation with him indicates that the media would cover such an individual's response to statements he believes are inaccurate or unsupported.[16] In general, too, the person has assumed the risk that public exposure might lead to misstatements about him. Famous persons may not have submitted voluntarily to a loss of reputation as such. Nevertheless, their renouncement of anonymity or tolerance of publicity unavoidably carries with it the possibility that the press, in fulfilling its role of reporting and critiquing matters of public concern, may investigate their talents, character, and motives. The media

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[15] In many instances, of course, the public may accord a person a degree of respect that a reasonable person—or judge—might believe is undeserved. This assessment, however, is not material to the issue before the court. Instead, the proper question is whether a reasonable person would conclude that, in fact, the public pays him heed.

In this vein, we note that many well-known athletes, entertainers, and other personages endorse commercial products, publicly support political candidates, or take open stands on public issues. This phenomenon, regardless of whether it is justified, indicates that famous persons may be able to transfer their recognition and influence from one field to another. At the very least, businessmen and politicians are willing to stake substantial funds on the effectiveness of this form of advertising. A person's power to capitalize on his general fame by lending his name to products, candidates, and causes indicates the broad influence he has. The ability to affect a variety of areas makes close scrutiny in the press especially appropriate, in particular to educate the public on the famous person's actual expertise with reference to whom or what he is promoting.

[16] Note, *supra* note 11, at 1210.

serve as a check on the power of the famous, and that check must be strongest when the subject's influence is strongest.[17] Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good.[18]

In determining whether a plaintiff has achieved the degree of notoriety and influence necessary to become a public figure in all contexts, a court may look to several factors.[19] The judge can examine statistical surveys, if

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[17] *See* Robertson, *supra* note 14, at 225-26.

[18] In rare instances, a celebrity may decide to abandon his prominent position in society to return to anonymity, but persistent press attention, most likely fueled by continuing public interest, may thwart his quest for privacy. In such a case, he still may be a public figure. Although he no longer is accepting the risk of defamation voluntarily, he remains able to reply to attacks through the press, which is continuing to cover him. Because he irretrievably has lost his anonymity, potential damage to reputation poses a small incremental danger. *See* Note, *supra* note 11, at 1210, 1219. Moreover, his power and influence, due to his prominence, may continue despite his efforts to renounce publicity. Thus, his actions still, as *Gertz* put it, "invite attention and comment." 418 U.S. at 345. Media scrutiny remains appropriate and necessary to balance his undesired but nonetheless real impact on the affairs of society. *Gertz* itself acknowledged that such a situation might arise. *See id.* (recognizing the existence, at least in theory, of "involuntary public figures").

[19] The court must examine these factors as they existed before the defamation was published. Otherwise, the press could convert a private individual into a general public figure simply by publicizing the defamation itself and creating a controversy surrounding it and, perhaps, litigation arising out of it. *See* Hutchinson v. Proxmire, 99 S. Ct. 2675, 2688 (1979) ("those charged with defamation cannot, by their own conduct, create

presented, that concern the plaintiff's name recognition.[20] Previous coverage of the plaintiff in the press also is relevant. The judge can check whether others in fact alter or reevaluate their conduct or ideas in light of the plaintiff's actions. He also can see if the plaintiff has shunned the attention that the public has given him and determine if those efforts have been successful.[21] At all

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their own defense by making the claimant a public figure"). This perspective also ensures that the press and the individual can analyze the latter's status before the defamation, thereby enabling them to take steps they deem appropriate to investigate further (in the case of the media) or to renounce public involvement (in the case of the individual). *See* pp. 8-10 *supra*.

[20] *E.g.*, Robertson, *supra* note 14, at 224. We do not believe that the Supreme Court, in employing the phrase "*general* fame or notoriety" in *Gertz*, 418 U.S. at 352 (emphasis added), necessarily meant that a majority or more of the public must know of the plaintiff. Rather, we conclude that "general" fame means being known to a large percentage of the well-informed citizenry.

In *Gertz* the Court remarked, "None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population." *Id.* We do not believe that this passing observation was intended to encourage polling jurors or veniremen to gauge a plaintiff's general fame or anonymity. Because of its small size and the non-random elements that go into its selection, we doubt that in most cases a jury would be a statistically reliable sample representative of the general population. The question is whether such a poll would be relevant—*i.e.*, probative—evidence admissible on this issue.

[21] Simply announcing that one no longer desires press coverage and then refusing to grant interviews may not be enough. A person who takes these steps may be continuing in a career that captivates the public, be it in politics, business, the arts, sports, or entertainment. Because public interest in him persists and because he has chosen to occupy a position that places him in the spotlight and thereby may

times, the judge should keep in mind the voluntariness of the plaintiff's prominence and the availablity of self-help through press coverage of responses—in other words, whether the plaintiff has assumed the risk of reputational injury and whether he has access to the media. No one parameter is dispositive; the decision still involves an element of judgment. Nevertheless, the weighing of these and other relevant factors can lead to a more accurate—and a more predictable—assessment of a person's overall fame and notoriety in the community.[22]

D.

Few people, of course, attain the general notoriety that would make them public figures for all purposes. Nevertheless, many persons "have thrust themselves to the

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make him influential, he retains his access to the media and has invited continued attention and comment. *See* Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). *See also* note 18 *supra* (involuntary public figures); note 36 *infra* (position conferring public-figure status).

[22] In examining the status of the plaintiff in *Gertz*, the Court noted that he had "no general fame and notoriety *in the community*" and that he was not generally known to "the *local* population." 418 U.S. at 351-52 (emphasis added). We therefore conclude that nationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety where he was defamed—*i.e.*, where the defamation was published.

Dissemination to a wide audience creates special problems. For example, an individual may be well known in a small community, but the publication covers a larger area. In such a situation, it might be appropriate to treat the plaintiff as a public figure for the segment of the audience to which he is well known and as a private individual for the rest. In any event, the defamation's audience may be relevant in assessing damages, for injury may be less if the audience does not know of the victim and will have no occasion to interact with him in the future.

forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345. Thus, even if a court finds that a plaintiff is not a general public figure, it still must examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976).[23] Rather, a

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[23] *Firestone* involved a national newsmagazine's allegedly defamatory report of divorce proceedings between the heir to the Firestone tire fortune and his socially prominent wife. The Court first rejected the contention that Mrs. Firestone was a general public figure. 424 U.S. at 453. It then stated:

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did [Mrs. Firestone] freely choose to publicize issues as to the propriety of her married life.

Id. at 454. We read these remarks as meaning that matters essentially of a private nature do not become public controversies solely because members of the public find them appealing to their "morbid or prurient curiosity." Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1446 (1975). Disputes of this nature, in addition, generally do not have appreciable consequences for nonparticipants. *See* pp. 17-19 *infra*.

Likewise, publicity surrounding litigation does not by itself elevate the parties to public figures, even if they could antici-

public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

Courts must exercise care in deciding what is a public controversy. Newsworthiness alone will not suffice, for the alleged defamation itself indicates that someone in the press believed the matter deserved media coverage.[24] Moreover, a court may not question the legitimacy of the public's concern; such an approach would turn courts into censors of " 'what information is relevant to self-government.' " *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)). *Accord, Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).[25] A vital

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pate the publicity, unless they are using the court as a forum for espousing their views in other controversies. Wolston v. Reader's Digest Ass'n, 99 S. Ct. 2701, 2707-08 (1979); Time, Inc. v. Firestone, 424 U.S. at 455-57. Nevertheless, litigation itself can become controversial. For example, the public might debate the prosecutor's use of his discretion in bringing particular criminal charges or the judge's conduct of the proceedings. In these instances, however, the controversy is not the matter being litigated. Parties to the original court action could become embroiled in the public controversy so much that they become public figures for that controversy; it is also possible that they will take no part in that debate. Refusing to make participation in publicized litigation a sufficient condition for becoming a public figure has salutary policy effects, for it avoids deterring either resort to the courts to settle disputes when one believes he has been wronged or active defense when he believes he has been accused of some civil or criminal misconduct unjustifiably.

[24] Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 284. *See* Wolston v. Reader's Digest Ass'n, 99 S. Ct. 2701, 2708 (1979).

[25] As the Supreme Court wrote 40 years ago, "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama,

part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society's agenda.[26] Thus, courts must look to what already were disputes. *See Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2688 (1979).

To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question.[27] A general concern or interest will not suffice.

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310 U.S. 88, 102 (1940). The controversy need not concern political matters. In a case that involved a defamation action brought by a professional athlete, one court observed:

> We obviously cannot say that the public's interest in professional football is important to the commonweal or to the operation of a democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated. . . . [I]nterest in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression.

Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). *Cf.* Ingber, *Defamation: A Contest Between Reason and Decency*, 65 VA. L. REV. 785, 841-42 (1979) (fearing that *Gertz* leaves little room for debate of matters other than "mainstream issues").

[26] Ingber, *supra* note 25, at 836-42.

[27] We do not believe it necessary to state that a court should define the controversy "narrowly" or "broadly." A narrow controversy will have fewer participants overall and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact. Indeed, a narrow controversy may be a phase of another, broader one, and a person playing a major role in the "subcontroversy" may have little influence on the larger questions or on other subcontroversies. In such an instance, the plaintiff would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases.

Id. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.[28] It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.[29] If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.

Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must have achieved a "special prominence" in the debate. *Id.* at 351. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.[30] In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *See* pp. 13-15 *supra*.[31] *See generally Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440,

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[28] The public need not be the immediate decisionmaker, for in a democracy the people should be well informed on issues to be decided, at least directly, by their representatives. *See also* note 25 *supra*.

[29] Note, *supra* note 11, at 1215.

[30] *Id.* at 1210-11.

[31] Responding to press inquiries or attempting to reply to comments on oneself through the media does not necessarily mean that a person is attempting to play a significant role in resolving a controversy. *See* Time, Inc. v. Firestone, 424 U.S. 448, 454 n.3 (1976).

445 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).[32]

Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him.[33] Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection.

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[32] At first glance, it may seem anomalous that a person who falls slightly short of the general fame required to be a general public figure but who is not involved in any particular public controversy is a private person, while a citizen who becomes influential in a single issue is a limited-purpose public figure. We believe that this result is correct and consistent with the principles underlying *New York Times* and *Gertz*. The limited public figure by definition is playing or attempting to play a major role in influencing one aspect of society. A well-known celebrity becomes a public figure because the press must be entitled to presume that persons to whom the general public pays close attention have substantial influence over a multitude of areas, *see* note 15 *supra*, and thus may play some role in their outcome. The person who lacks the level of recognition to be classified as a general public figure no longer can be assumed to have pervasive influence in society. Thus, we must return to a more particularized inquiry into the circumstances of his case. If in fact he is shaping or is trying to shape the outcome of a specific public controversy, he is a public figure for that controversy; if not, he remains a private individual.

[33] *See* RESTATEMENT (SECOND) OF TORTS § 580A (1977) (public figure's "conduct, fitness or role"). In Garrison v. Louisiana, 379 U.S. 64 (1964), decided shortly after *New York Times*, the Supreme Court remarked:

> The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper

Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye. Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he, too, has "invited comment" relating to the issue at hand. In any event, media coverage of the controversy can be expected to include reports on a major participant's reply to misstatements made about him.[34] In short, the court must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy and whether the alleged defamation related to that controversy.

IV.

With the foregoing analysis in mind, we now must determine whether Judge Corcoran correctly concluded that Waldbaum was a public figure. As noted above, Fairchild concedes that he was not a general-purpose public figure, and Waldbaum concedes that he cannot prove "actual malice" within the meaning of *New York Times*. Thus, if we agree with Judge Corcoran that Waldbaum was a limited-purpose public figure and that Fairchild's alleged defamation fell within the relevant range of issues, we must affirm the grant of summary judgment. After examining the facts, we do agree and, therefore, affirm.

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motivation, even though these characteristics may also affect the official's private character.

Id. at 77, *quoted in part in* Gertz v. Robert Welch, Inc., 418 U.S. at 344-45.

[34] *See* Note, *supra* note 11, at 1219. Correcting inaccurate media reports about oneself does not by itself prove access or public-figure status. *See* note 31 *supra*.

Evidence submitted with Fairchild's motion for summary judgment indicates clearly that Greenbelt was an innovative company often the subject of news reports. As the second largest cooperative in the nation it attracted attention, and its pathbreaking marketing policies—*e.g.*, unit pricing, open dating, and highly competitive advertising—became the subject of public debate within the supermarket industry and beyond, debate that would affect consumers and retailers in the Washington area and, perhaps, elsewhere. We therefore believe that, before *Supermarket News* published its story about Waldbaum's dismissal, public controversies existed over the viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that Greenbelt in particular was pioneering.

With some admittedly overlapping controversies identified, we now must examine Waldbaum's role in them. Waldbaum was known as a leading advocate of certain precedent-breaking policies before coming to Greenbelt. *See, e.g., Eric Waldbaum New Head at Greenbelt*, Supermarket News, Jan. 4, 1971, at 4, col. 1, *reprinted in* Supp. App. at 320. He has admitted that as president and chief executive officer, he pursued these policies and other consumer-oriented activities. App. at 58-59 (deposition of Waldbaum). He felt that educating the community at large was one function of a cooperative such as Greenbelt. *Id.* at 56.[35] Greenbelt published its own monthly newspaper, *Co-op Consumer*, and Waldbaum "insisted" that he, as president, approve all information placed in it for the shareholders. *Id.* at 48.

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[35] We quote from Waldbaum's deposition:

> I spent a great deal of my time at the Cooperative in dealing with the membership, its Congress, its area councils, on questions of how they could make input into the Cooperative consistent with managing the business in a way which would inure to the benefit of all its share-

Being an executive within a prominent and influential company does not by itself make one a public figure.

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holders. *I went out of my way to solicit and promote involvement of its membership.* I don't know how you weigh what a statement means, that it is the most import aspect.

App. at 55 (emphasis added).

Well, in a typical organization that is involved solely with—its shareholders are concerned only with the performance of the corporation for its shareholder interests, the consumer cooperative, *and particularly Greenbelt, has considered itself as having an obligation to education in the community at large*; witness the involvements of its member relations department. So that much of my time was spent—much of the time of members of my staff would be spent—on things that might not inure to the earnings or to shareholder equity but were done to teach and educate people about consumers and cooperatives and their rights—a very, very different kind of approach—so that *I really had two full time jobs, not only managing a corporation in all of its aspects but also this tremendous social outreach.*

Id. at 56-57 (emphasis added).

. . . I was hired as the chief executive officer of the Coop to do a job that included a broad scope of things. That is why I couldn't answer your first question, what does it mean to—what do you do when you are the president? You do everything. You are responsible for the day-to-day management of a company. *You are responsible for its public image.* To me, *I felt as strongly about the consumer aspects of Greenbelt, and I think that the Coop's livelihood depended on the promulgation of the consumer aspects,* which is why I spent so much time on it.

I think that they went hand in hand. I don't know what commercial aspects might be, but I considered myself performing all of the duties for which I was hired, capable of performing them and capable of serving as a chief executive officer *in today's climate when questions about the social commitment of corporations are prime issues and prime concerns,* and not just looking at questions of the balance sheet.

Id. at 58 (emphasis added).

In many cases, a corporate official is simply a conduit for announcing and administering company policies made by others. Similarly, many executives who do make corporate policy do not thereby take stands in public controversies.[36] These descriptions, however, do not fit Eric Waldbaum at Greenbelt. His own deposition indicates that he was the mover and shaper of many of the cooperative's controversial actions. He made it a leader in unit pricing and open dating. He supervised, or at least approved, the consumer-oriented views that appeared in *Co-op Consumer*. In short, as Judge Corcoran so aptly put it, "he did not become merely a boardroom president whose vision was limited to the balance sheet. He became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing." *Waldbaum v. Greenbelt Consumer Services, Inc.*, Civ. No. 76-1810, at 12 (D.D.C. Feb. 15, 1979) (memorandum and order granting Fairchild's motion for summary judgment), *reprinted in* App. at 150, 161. Given Greenbelt's prominence, his activities certainly extended beyond those of a profit-maximizing manager of a single firm.

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[36] Sometimes position alone can make one a public figure. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.); Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). The position itself may be so prominent that any occupant unavoidably enters the limelight and thus becomes generally known in the community—a general public figure. Similarly, the responsibilities of a position may include decisionmaking that affects significantly one or more public controversies, in which case the occupant becomes a limited public figure for those controversies. Courts should avoid generalizing, however, for labelling certain positions as always being public is tantamount to making subject-matter classifications, forbidden under the case law. *See* Hutchinson v. Proxmire, 99 S. Ct. 2675, 2688 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976). Courts therefore must undertake the analysis outlined above in each case.

Thus, it would appear to a reasonable person that Waldbaum had thrust himself into the public controversies concerning unit pricing, open dating, the cooperative form of business, and other issues. He did so in an attempt to influence the policies of firms in the supermarket industry and merchandising generally. In the process, he assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management, for the commercial success or failure of the actions he was advocating certainly is strong evidence in the public debate over whether other firms should adopt them. Furthermore, Waldbaum had prior dealings with the media. *See* App. at 44-46, 62-67 (deposition of Waldbaum) (descriptions of dealings with the press). Although he personally was not frequently the subject of articles, he was somewhat familiar with press operations and had held press conferences to discuss Greenbelt's policies and operations. Looking at the overall picture, we conclude that Waldbaum was a public figure for the limited purpose of comment on Greenbelt's—and his own—innovation policies and that the article giving rise to this action was within the protected sphere of reporting. Because Fairchild concededly did not act with "actual malice," it was entitled to summary judgment.

V.

Not everyone who participates in activities that affect the public becomes a public figure. Nevertheless, when one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate. Waldbaum was such a person, and comment on his termination as president and chief executive officer of Greenbelt falls within the range of reports protected under *New York Times*. Therefore, the judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC WALDBAUM,

Plaintiff,

v. Civil Action
No. 76-1810

GREENBELT CONSUMER
SERVICES, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

Before the Court is the motion for summary judgment by the defendant Fairchild Publications, Inc. (Fairchild) as to Count VII of the Complaint filed by the plaintiff, Eric Waldbaum on September 28, 1976. For the reasons discussed below, the Court concludes that the motion should be granted.[1]

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1 To prevail Fairchild must demonstrate that the absence of any genuine issue of material fact entitles it to a judgment as a matter of law. Fed. R. Civ. P. 56(e); Local Rule 1-9(h); Congressional News Syndicate v. U.S. Dept. of Justice, 438 F.Supp. 538 (D.D.C. 1977).

A. Factual Background

When originally filed, the Complaint included eight separately numbered counts wherein the plaintiff sought to recover damages from Greenbelt Consumer Services, Inc. (Greenbelt) arising from Greenbelt's alleged breach of its employment contract with the plaintiff. Additionally Waldbaum asserted that Greenbelt along with the other named defendants, Fairchild and Bruce Patner, a Greenbelt director, had libeled and slandered him. However on March 28, 1977, Waldbaum dismissed the Complaint with prejudice as against Greenbelt and Patner pursuant to Fed. R. Civ. P. 41(a)(1). Accordingly, only Count VII alleging libel on the part of Fairchild remains before the Court.

As regards Count VII, the Court finds that there is no genuine dispute as to the material facts which follow.

In January 1971, the plaintiff was hired by Greenbelt as its president and chief executive officer. Greenbelt is a Maryland corporation which operates as a "consumer cooperative" and is presently engaged in the retail operation of supermarkets ("Co-op Supermarkets"), furniture

and gift stores ("SCAN" Stores) and automobile service stations ("EXVAL" stations). During Waldbaum's stewardship, Greenbelt ranked as the second largest cooperative in the country, having approximately 38,000 member shareholders. The stock of Greenbelt was registered with the Securities and Exchange Commission.

In addition to the usual Board of Directors, Greenbelt had a governing body denominated as the "Congress of the Cooperative" which consisted of individuals elected annually from the general membership.

Waldbaum served as Greenbelt's president until March 16, 1976, when he was notified by the Board of Directors that it had decided not to renew his employment contract which was to expire by its terms on May 31, 1976. The Board immediately relieved Waldbaum of all authority as chief executive officer and Waldbaum vacated his offices on March 16.

A report of Waldbaum's departure from Greenbelt appeared on March 22, 1976 in the Supermarket News, (the News). The News is a national trade newspaper which has been published weekly by Fairchild

for the past twenty years. Supermarket executives and management in related industries comprise its readership. The article in question was authored by Ann Telthorst, a reporter in the Washington bureau of Fairchild News Service (FNS), and appeared under the headline "Greenbelt Ousts Eric Waldbaum." The body of the article read as follows:

> Washington (FNS) - Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.
>
> Rowland Burnstan will serve as acting chief executive office [sic] until a new president is named. Burnstan, an independent management consultant and economist, has worked for various Government agencies and businesses.
>
> Greenbelt said part of his interim job will be to locate a new president for the co-op, which has been losing money the past year and retrenching.
>
> Waldbaum had served as president since 1971. His plans are not known.

To support his claim of libel, Waldbaum focuses on the third paragraph of the News article. He complains that it includes assertions of fact which are false, i.e. that Greenbelt "has been

losing money for the past year and retrenching." The allegedly false statement according to Waldbaum adversely reflects upon his business reputation and is accordingly libelous.

In response to an earlier Fairchild motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), we concluded that the News article was reasonably susceptible to either of two interpretations -- one defamatory and the other innocent, and that it was within the province of the jury to decide which sense was conveyed. Accordingly, we denied that motion on July 7, 1977.

In its summary judgment motion, Fairchild seeks to avail itself of the protection afforded by the First Amendment to the end that "a public figure involved in an issue may not recover damages for a defamatory falsehood relating to that issue unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Hoffman v. Washington Post Co., 433 F.Supp. 600, 603 (1977); see Curtis

Publishing Co. v. Butts, 388 U.S. 130 (1967).

Fairchild contends that we should conclude that Waldbaum is a "public figure," that the News article was not published with actual malice, and consequently that a judgment should be entered in its favor at this juncture.

Waldbaum concedes that the News article was not published with actual malice.[2] However Waldbaum would have us hold that he is not a "public figure," and thus that he may recover actual damages upon proof that Greenbelt was merely negligent in the research and publication of the News article.

B. Public Figure

It is for the Court to decide whether the plaintiff is a "public figure," though oft-times that is a mixed question of law and fact. Rosenblatt v. Baer, 383 U.S. 75, 88; Wolston v. Reader's Digest Ass'n, Inc., 578 F.2d 427, 429 (1978);

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2 Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, filed January 5, 1979 at page 2.

Hoffman, 433 F.Supp. at 604 (and the cases cited therein).

Looking to the earlier pronouncements of the Supreme Court on the public figure concept, we find an articulation of the elements to be weighed in Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1973) where the Court stated:

> That designation [of public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Thus, to prevail on its motion, Fairchild must prove that Waldbaum falls within either of two categories: (1) public figure for all purposes or (2) public figure for a limited range of issues.

Before endeavoring to apply this standard to the case at bar, we offer some general comments on the evidence the

defendant has presented to support its motion.

In an Index attached to its motion, Fairchild has submitted copies of newspaper articles (Exhibits A-1 through A-31) which appeared in the Washington Post and the Supermarket News between March 3, 1969 and July 3, 1977. We have reviewed each of these exhibits and will indicate briefly their content.

The five articles[3] antedating Waldbaum's arrival at Greenbelt in January, 1971, report and comment upon the financial health of the cooperative, its expansion and its innovative practices in providing for consumer education and information.

Twenty-two articles appeared during Waldbaum's tenure as Greenbelt's president. Ten of those articles mention Waldbaum by name[4] in connection with (1) his appointment as president; (2) Greenbelt's quarterly financial status;

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3 Exhibits A-1 through A-5.

4 Exhibits A-6, A-8, A-11, A-13, A-24, A-16, A-18, A-21, A-22 and A-27.

(3) the cooperative's attempts to criticize its competitors through newspaper advertising, and (4) Greenbelt's efforts to enter into oil exploration.

The remaining twelve articles deal variously with Greenbelt's financial reports, store closings, its activities as "consumer advocate," and the cooperative's relative position within the food industry.

The four articles following Waldbaum's departure[5] touch upon the particular problems impeding Greenbelt's continued growth and profit potential as a consumer cooperative.

Additionally, Fairchild has submitted a copy of a publication entitled Co-op Consumer (the Consumer)[6] issued monthly by Greenbelt and distributed to its membership. Waldbaum concedes that he authored articles for this publication as part of his official duties as Greenbelt's president on the instructions of its Board of Directors.[7]

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5 Exhibits A-27 through A-31.

6 Exhibit D

7 Deposition of Eric Waldbaum taken on Sept. 13, 1978 at p. 120-121 (the Waldbaum deposition).

Fairchild also has invited the Court's attention to selected portions of Waldbaum's deposition taken on September 13, 1978.[8] Therein Waldbaum testified inter alia: (1) that during his tenure, based on his recommendation, Greenbelt closed 10 supermarkets, all of its pharmacies, 3 service stations and a furniture store[9]; (2) that he wrote press releases on the financial status of Greenbelt[10] (3) that he attended meetings sponsored by Greenbelt to which the public and press were invited where the topics of energy legislation, fuel allocation, unit pricing and open-dating were discussed[11]; (4) that while at Greenbelt he was required to approve all press releases[12] and (5) that while he

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8 The Court would note that it has read the Waldbaum deposition in its entirety.

9 Waldbaum deposition at p. 65, 86, 88 and 89.

10 Waldbaum deposition at p. 115.

11 Id.

12 Id. at p. 14.

was at his previous jobs (KMS Bruce and E.J. Korvettes)[13] he would answer routine inquiries by reporters when these were in his field of expertise.[14]

(1) Public Figure for all Purposes

The standard Fairchild must meet to prove Waldbaum a general public figure was outlined by the Court in Gertz, 418 U.S. at 352:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society an individual should not be deemed a public personality for all aspects of his life. (emphasis supplied).

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13 Id. at p. 224-225.

14 We note in passing that both parties have submitted numerous other exhibits which set out Greenbelt's financial posture at particular times. This evidence apparently bears on the question of the truth of the assertions within the News article as to Greenbelt's "losing money." However, the "truth is a defense" argument has not been pressed as part of the pending motion, and consequently we need not consider it at this juncture.

Keeping in mind the defendant's burden of adducing "clear evidence of general fame," our review of the evidence submitted by Fairchild leads us to conclude without hesitation that Waldbaum cannot properly be deemed to be a "public person for all purposes." The evidence clearly fails to demonstrate that Waldbaum assumed an "influential role in ordering society."[15]

(2) Limited Public Figure

Much effort[16] has been expended in attempting to define the class of persons

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15 Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1966) (concurring opinion by Chief Justice Warren).

16 There follows a list, not intended to be exhaustive, of cases which have dealt with this issue:

Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978); Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970); Vitale v. National Lampoon, 449 F.Supp. 442 (E.D. Pa. 1978); Logan v. District of Columbia, 447 F.Supp. 1328 (D.D.C. 1978); Rinsley v. Brandt, 446 F.Supp. 850 (D. Kan. 1977); Reliance Insurance Co. v. Barron's, 442 F.Supp. 1341 (S.D.N.Y. 1977); Hoffman v.

correctly categorized as "public figures for a limited range of issues." It has been said that "defining public figures is much like trying to nail a jellyfish to the wall." Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 443 (S.D. Ga. 1976).

In Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir. 1968) the court concluded that public figures are:

> those persons who though not public officials are 'involved in issues in which the public has a justified and important interest.' Such figures are of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.

(Footnote Continued)
Washington Post Co., 433 F.Supp. 600 (D.D.C. 1977), aff'd 578 F.2d 442 (D.C. Cir. 1978); Hutchinson v. Proxmire, 431 F.Supp. 1311 (W.D. Wisc. 1977); Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254 (E.D. Pa. 1977); Wolston v. Reader's Digest Ass'n Inc. 429 F. Supp. 167 (D.D.C. 1977); aff'd 578 F.2d 427 (D.C. Cir. 1978); Martin Marietta Corp. v. Evening Star Newspaper, 417 F.Supp. 947 (D.D.C. 1976); Rosonova v. Playboy Enterprises, Inc. 411 F.Supp. 440 (S.D. Ga. 1976); Fram v. Yellow Cab Company of Pittsburgh, 380 F.Supp. 1314 (W.D. Pa. 1974).

Chief Justice Warren described public figures as those who "play an influential role in ordering society" and "who have . . . ready access . . . to mass media of communications, both to influence policy and to counter criticism of their views and activities."[17] And, another court has opined that a public figure is one "who has voluntarily invited close public scrutiny by thrusting himself into the public arena."[18]

Varying formulations of the test to determine limited issue public figures have appeared since Gertz. In Wolston v. Reader's Digest Ass'n, Inc., 429 F.Supp. 167 (D.D.C. 1977); aff'd 578 F.2d 427 (1978), Chief Judge Bryant of this Court held that to qualify as a limited issue public figure, one must be involved in a "public controversy" and that the involvement must be both voluntary and significant. In its opinion affirming, the conclusions of Judge Bryant, our Court of Appeals stated that the evidence

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17 Curtis, 388 U.S. at 164 (concurring opinion).

18 Reliance, 442 F.Supp. at 1347.

supported a conclusion that: ". . . by his voluntary action he [Wolston] invited attention and comment in connection with the public questions . . ." (emphasis supplied)[19]

The Court in Fram v. Yellow Cab Company of Pittsburgh, 380 F.Supp. 1314, 1333 (W.D. Pa. 1974) fashioned the test in this manner:

> Under Gertz, the inquiry as to whether the New York Times' protection applies does not cease one it is determined that the defamatory publication concerns an event of public concern. The inquiry must continue to determine whether the private individual has become a public figure. (emphasis supplied)

Thus, it appears that, although the Gertz court counsels that we should focus primarily on whether the plaintiff is a public or private actor rather than on the subject matter of the allegedly libelous discussion, we must initially decide whether the facts in the case sub judice sufficiently touch upon a matter of "public controversy."[20]

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19 Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 431 (D.C. Cir. 1978).

20 The conclusion of the court in Rinsley v. Brandt, 446 F.Supp. 850, 857

The Supreme Court has never set forth a precise definition of "public controversy."[21]

In articulating for the first time the standard of "actual malice" in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court was clearly motivated by its recognition of the "profound

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(Footnote Continued)
(D. Kan. 1977) supports our determination that we must first look to the nature of the issues involved:

> As noted earlier we have concluded that the Gertz emphasis on status analysis should be extended to overrule the Hill emphasis on public interest analysis in the privacy field. Despite this conclusion, the element of public interest still remains an important factor in the determination of who is a public official or a public figure. Every defamation case from New York Times to Gertz involved issues of public interest and was concerned with the public's interest in having access to information. Further reading of the case law since Gertz, including that authored by the Supreme Court as well as that by lower courts, still indicates that public interest analysis is far from irrelevant.

21 Wolston, 429 F.Supp. at 175 (footnote 27).

national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks. . . ."[22] If viewed only in the light of this language, the concept of "public controversy" might properly be restricted to the resolution of issues deemed important to the operation of a democratic society and touching upon political and ideological matters. However, later pronouncements of the Court cast doubt on the propriety of such a narrow interpretation.

Mr. Justice Harlan speaking for the Court in Curtis, 388 U.S. at 147 stated:

> In Time, Inc. v. Hill, 385 U.S. 374, 388, we held that '[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . .' and affirmed that freedom of discussion 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102. This carries out the intent of the

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22 New York Times, Co. v. Sullivan, 376 U.S. 254, 270 (1963).

> Founders who felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government. Letter to the Inhabitants of Quebec. 1 Journals of the Continental Cong. 108. (emphasis supplied)

But, in its most recent treatment of the issue in Time, Inc. v. Firestone, 424 U.S. 448 (1975), the Court held that a widely publicized divorce proceeding involving the wife of the scion of a wealthy industrial family was not the sort of public controversy envisioned by Gertz, and that the appellant erroneously sought to "equate 'public controversy' with all controversies of interest to the public."[23] It appears however that the Court was equally troubled by the absence of any desire on the appellee's part to be before the public eye: Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bounds of matrimony."[24]

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23 Time, Inc. v. Firestone, 424 U.S. 448, 454 (1975).

24 Id.

We have reviewed the efforts of other courts to apply the Supreme Court's teachings.[25] On balance, we are persuaded by the reasoning of the court in Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254 (E.D. Pa. 1977). In that case District Judge Becker concluded that the Supreme Court did not intend to restrict the arena of public controversy only to those situations where there exists an identifiable issue of national import for resolution. Rather "public controversy" should embrace as well those instances:[26]

> Where a person has however, chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' even if he has no ideological thesis to promulgate. . . .

In so doing such an actor has voluntarily placed himself on the public stage and "invites general public discussion."[27]

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25 See footnote 18, supra.

26 Chuy, 431 F.Supp. -at 267.

27 Id.

Although we are not aware of any cases factually on all fours with the situation in the present case, we are convinced that within the framework and intendment of Gertz, Curtis and the other cases cited supra we are dealing with a matter of public interest in which Waldbaum played a leading role and hence qualifies as a public figure for the limited purposes of this controversy.

An undeniable fact of substantial importance is that Greenbelt Co-op, as the second largest commercial co-op in the United States, was a force of consequence in the field of supermarketing, and the subject of interest and comment in the industry and in the media which served the industry.

We believe our review supra of the newspaper reports concerning Greenbelt and Waldbaum bears this fact out.[28]

When Waldbaum assumed the position of chief executive officer, he did not become merely a boardroom president whose vision was limited to the balance sheet.

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28 See footnotes 3, 4, 5 and 6 supra.

He became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing. In his own words:

> I [Waldbaum] was hired as the chief executive officer of the coop to do a job that included a broad scope of things. That is why I couldn't answer your first question, what does it mean to -- what do you do when you are the president? You do everything. You are responsible for the day-to-day management of a company. You are responsible for the day-to-day management of a company. You are responsible for its public image. To me. I felt as strongly about the consumer aspects of Greenbelt, and I think that the Coop's livelihood depended on the promulgation of the consumer aspects, which is why I spent so much time on it.
>
> I think that they went hand in hand. I don't know what commercial aspects might be, but I considered myself performing all of the duties for which I was hired, capable of performing them and capable of serving as chief executive officer in today's climate when questions about the social commitment of corporations are prime issues and prime concerns, and not just looking at questions of the balance sheet. (emphasis supplied).[29]

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29 Waldbaum deposition at 168.

Waldbaum perceived his role as including duties one might not normally ascribe to a corporate president:

> Well, in a typical organization that is involved solely with -- its shareholders are concerned only with the performance of the corporation for its shareholder interests, the consumer cooperative, and particularly Greenbelt, has considered itself as having an obligation to education in the community at large; witness the involvements of its member relations department. So that much of my time was spent -- much of the time of members of my staff would be spent -- on things that might not inure to the earnings or to shareholder equity but were done to teach and educate people about consumers and cooperatives and their rights -- a very, very different kind of approach -- so that I really had two full time jobs, not only managing a corporation in all of its aspects but also this tremendous social outreach. (emphasis supplied)[30]

To achieve this "social outreach" and to educate Greenbelt's membership, Waldbaum undertook a number of activities:

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30 Waldbaum deposition at 159-160.

> I spent a great deal of my time at the Cooperative in dealing with the membership, its congress, its area councils, on questions of how they could make input into the Cooperative consistent with managing the business in a way which would inure to the benefit of all its shareholders. I went out of my way to solicit and promote involvement of its membership. I don't know how you weigh what a statement means, that it is the most important aspect. (emphasis supplied)[31]

Thus, the record reflects that in assuming the presidency of Greenbelt, Waldbaum was fully cognizant that Greenbelt's unique position as a "consumer cooperative" within the supermarket industry placed special demands on the shoulders of its chief executive. The Cooperative's ability to attract new members and to sustain new growth depended on its successfully projecting an image of commitment to the concerns of its consumer members. Accordingly, Waldbaum was required to venture forth before the public eye to espouse and promote the interest of Greenbelt's members. This he did through (1) his

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31 Waldbaum deposition at 148.

authorship of news articles in the Consumer, (2) his participation in public discussions of questions of "prime concern" to the food industry and the consuming public -- in particular fuel allocation, unit pricing and open dating of retail merchandise, (3) his active solicitation of new members for the cooperative, and (4) his strong and continued association with the Congress of the Cooperative and its area member councils. Waldbaum's responsibility to develop the public image of the corporation dictated that he not remain hidden in the corporate boardroom. We believe Waldbaum "assumed the risk of publicity, good or bad, so far as it concerned his public performance."[32]

At the same time, on a different front, Waldbaum emerges as the prime mover behind a major reorganization of Greenbelt's assets. As noted supra, Waldbaum recommended and succeeded in securing the closing of 10 of Greenbelt's supermarkets, all of its pharmacies, and

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32 Time, Inc. v. Johnson, 448 F.2d 378, 380 (4th Cir. 1971).

several of its automobile service stations. These significant changes in Greenbelt's corporate posture impacted upon and were scrutinized by Greenbelt's members, the consumer public, the press, and the food retail industry in general.

We believe that the Supermarket News article did not deal with any facet of the plaintiff's private life, but rather was fair comment on Waldbaum's performance and departure from Greenbelt. Because of Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position, we find the plaintiff to have been a public figure for the limited purpose of those issues. That being so, and lack of malice being an admitted fact, we conclude that the motion for summary judgment should be granted.

C. Conclusion

Accordingly, it is this 15th day of February, 1979,

ORDERED that the motion for summary judgment by the defendant Fairchild Publications, Inc. be, and the same is hereby, granted.

Howard F. Corcoran
JUDGE

APPENDIX C

Submitted as Exhibit A-6 in connection with Fairchild's Motion for Summary Judgment

Supermarket News; Monday, January 4, 1971; Page 24

Executive Changes

ERIC WALDBAUM NEW HEAD AT GREENBELT

WASHINGTON (FNS) -- Eric Waldbaum has been named president and chief executive officer of Greenbelt Consumer Services, consumer cooperative here.

The co-op also canceled its management contract with Checchi & Co., which has run the firm eight years.

Paul G. Nelson, who has been chief executive officer of GCS since last May, continues under contract on the Checchi staff.

Mr. Waldbaum, 32, was with Hill's Supermarkets, Brentwood, N.Y., as executive vice-president and assistant to the chairman. Hill's has annual sales of $350 million.

GCS annual sales rose from $22 million to $50 million during eight years under Checchi management. In 1967 the co-op acquired eight Kroger supermarkets

here and in 1969 it merged with Peninsula Cooperative Association, Hampton-Newport News, Va., which operated two supermarkets and a furniture store.

The firm operates 22 consumers' supermarkets, five consumers' pharmacies, 10 consumers auto service centers, seven Scan co-op contemporary furniture stores, a direct drug service, and Skinker Tires, tire distributor.

GCS expects Mr. Waldbaum to continue and expand its consumer-oriented programs. He introduced unit pricing at Hill's, a GCS official said, "and led New York chains in withdrawing opposition to unit pricing."

Mr. Waldbaum also favors open dating of perishables and views codes "as a manufacturer's black box which should be opened to consumers," the official continued.

Submitted as Exhibit A-8 in connection with Fairchild's Motion for Summary Judgment

Washington Post; May 1, 1971

Earnings Reports

ALLEGHENY LOSES $4.36 MILLION

. . . Greenbelt Consumer Services, Inc., which operates Consumers supermarkets and Scan furniture stores, reported a net loss for the year ended Jan. 30 of $169,049 (81 cents a share) compared to a net income the prior year of $206,402 ($1.17). Sales rose slightly to a record $50.97 million from $50.12 million.

President and chief executive Eric Waldbaum said the loss was caused by supermarket discounting in the D.C. area and increased labor costs. There were 35,643 member stockholders at year's end, up over 2,000 in the year.

Submitted as Exhibit A-11 in connection with Fairchild's Motion for Summary Judgment

Washington Post; October 6, 1971

GCS REPORTS LOSS

Greenbelt Consumers Services, Inc. announced a net loss of $104,945 (50 cents a share) on net sales of $26,554,921 for the two quarters ending July 31. This compares to last year's half-year net income of $34,218 (16 cents a share) on sales of $24,902,149.

GCS President Eric Waldbaum said second-quarter net loss was $30,753 (15 cents a share) on net sales of $13,430,023. For the same period in 1970 sales were $12,726,726 and income was $6,185 (3 cents a share).

Submitted as Exhibit A-13 in connection with Fairchild's Motion for Summary Judgment

Supermarket News; Monday, December 20, 1971; Page 10

GREENBELT HAS 13-WK. PROFIT

WASHINGTON (FNS) -- Greenbelt Consumer Services reported net income after taxes of $56,356 on sales that rose 13.3 per cent to $14,348,235 for the 13 weeks ended Oct. 30. This compares with

a net loss of $117,392 on sales of $12,661,123 last year.

Eric Waldbaum, president of GCS, said, "This represents the first profitable period of operations in the last five fiscal quarters." He noted that principal factors contributing to these earnings have been the company's ability to stem losses in the supermarket division and continued sales growth in its scan division.

For the year to date (39 weeks) Greenbelt reported a net loss of $48,569 on sales that rose 8.9 per cent to $40,903,156, compared with the 1970 period when the company reported a net loss of $83,174 on sales of $37,563,272.

Submitted as Exhibit A-14 in connection with Fairchild's Motion for Summary Judgment

Washington Post; April 7, 1972

D.C. NEWSPAPERS CRITICIZED FOR REFUSING GROCERY AD

By Abbott Combes

Rep. Benjamin S. Rosenthal (D-N.Y.), a leading consumer advocate in Congress, yesterday demanded a congressional investigation of the advertising policies of The Washington Post and The Evening Star newspapers.

Rosenthal said he was provoked by the refusal of both newspapers to publish a full-page advertisement for Consumers Supermarkets, a 21-store chain owned by Greenbelt Consumer Services Inc. of Silver Spring, which was brought to his attention yesterday by the firm's president.

The advertisement in question accuses other major supermarket chains in Washington of reacting too slowly to the declining wholesale prices of meat. The advertisement maintains that Consumers lowered its prices as early as March 16, while competitors were doing "precious little."

Rosenthal said it was "incredible" that two major Washington newspapers would deny their readers access to the information contained in the advertisement. "We would expect this from a small-town monopoly-controlled newspaper," he said.

Joseph Lynch, vice president-advertising of The Washington Post, said the advertisement was rejected because it failed to meet the newspaper's standard of "good taste" and because of its policy of not allowing "defamatory" messages regarding other retailers. Jack Schoo, advertising director of The Evening Star, gave similar reasons for rejecting the same ad.

When Congress reconvenes next week, Rosenthal said, he will ask Rep. William S. Moorhead (D-Pa.), chairman of the House subcommittee on freedom of information, to hold hearings on the matter. Further, Rosenthal said, he is scheduled to testify before the Price Commission on Wednesday "and unless this matter is resolved satisfactorily I'm going to tell them about it."

The advertisement began "When the giants of the food industry were feeding you bull, we were feeding you beef" and displays a picture of a bull.

The advertisement does not mention other supermarkets by name, but said Lynch, it made obvious references to them with a "play on words." Aside from the "giants" quote, the advertisement at one

point says, "The big chains did not react. They played it the safe way, the high profit way." There are numerous Giant and Safeway supermarkets in the Washington area.

Greenbelt Consumer Services, Inc. is a cooperative venture with more than 36,000 customer-shareholders. In addition to the supermarkets, it also operates pharmacies, service stations, and Scan furniture stores in the Washington-Baltimore area.

Eric Waldbaum, the president of Greenbelt, said he received a telephone call from The Evening Star on Wednesday morning that informed him that although the ad had appeared in The Star's food section in the first edition, it was being removed from the other four editions.

Submitted as Exhibit A-16 in connection with Fairchild's Motion for Summary Judgment

Washington Post; December 9, 1972
Earnings Reports

GREENBELT SHOWS NET OF $34,091

Greenbelt Consumers Services, Inc., which owns Consumers Supermarkets and Scan Furniture stores, reported profits of $34,091 (16 cents per share) in the quarter ended October 7, on sales of nearly $11 million.

For the three quarters ended the same day, Greenbelt posted a net loss of $403,838 ($1.85 a share) on sales of more than $35.5 million. Included in the 1972 loss was an operating setback of $290,000 plus an extraordinary charge of $113,871 (52 cents a share).

Figures of the previous year are not comparable because Greenbelt changed its fiscal year from 13-week quarters to three quarters of 12 weeks plus a final period of 16 weeks.

For 39 weeks ended October 30, 1971, Greenbelt also posted a loss of $48,569 (23 cents a share), on sales of $40.9 million.

President Eric Waldbaum said unprofitable operations are being closed, including a supermarket and pharmacy at Penn Daw.

Submitted as Exhibit A-18 in connection with Fairchild's Motion for Summary Judgment

Supermarket News; Monday, April 22, 1974; Page 17

OPERATIONS NET UP FOR GREENBELT

WASHINGTON (FNS) -- Gains in sales and net income from continuing operations for the fiscal year ended January 26 were reported Friday by Greenbelt Consumer Services.

GCS posted net income from continuing operations of $216,952, or 99 cents a share, on sales of $44,142,624. This compares with net income of $12,198, or six cents on sales of $43,122,933.

GCS reported a loss from discontinued operations of $93,441, or 42 cents a share, and extraordinary credit (net) of $102,000, or 46 cents a share, compared with a loss from discontinued operations of $467,462, or $2.15 a share, and extraordinary charges (net) of $52,165, or 24 cents.

Eric Waldbaum, GCS President, said the results "reflect the cooperative's program of closing certain unprofitable operations."

The co-op operates a dozen Consumers and Co-op supermarkets, eight Scan co-op contemporary furniture stores, seven Exval automobile service centers and three Consumers Pharmacies.

Submitted as Exhibit A-21 in connection with Fairchild's Motion for Summary Judgment

Washington Post; June 4, 1974

Capital Commerce

CO-OP EYES OIL VENTURE IN . . .

By William H. Jones

Greenbelt Consumer Services, Inc., the Washington area retail cooperative which experienced cutbacks in supplies from regular petroleum suppliers during last winter's energy squeeze, is thinking of taking action to guarantee gasoline availability in the future.

Along with other U.S. cooperatives, Greenbelt is conducting talks with the Irish Petroleum Cooperative that could

lead to establishment of a joint venture for oil exploration in the Irish Sea.

A spokesman for Greenbelt -- which operates Consumers supermarkets, Scan furniture stores, pharmacies and Exval gas stations -- said negotiations currently are taking place here and in Denver with three Irish leaders -- Patrick Kelly, general secretary of the Irish Agricultural Organization Society; Denis Murphy, controller of a dairy co-op; and James Hyland, deputy general manager of a food products co-op.

According to Greenbelt, the joint venture would promote oil and natural gas exploration and drilling in the Irish Sea, construction of refineries, and creation of a marketing program for petroleum that is refined.

Greenbelt Consumers currently operates seven gas stations in the D.C. area, down from about a dozen before the energy crisis curtailed supplies. Greenbelt treasurer Paul Mohn said U.S. cooperatives are interested in the venture to assure not only a dependable petroleum supply but also the "lowest possible marketing cost."

The area cooperative is generally regarded as the largest in the nation, having been formed 35 years ago by early families in the pioneer new town of Greenbelt, Maryland.

Greenbelt's Scan store chain is the nation's largest importer of Scandinavian furniture, including some products of cooperatives in the Scandinavian countries.

According to co-op president Eric Waldbaum, Greenbelt's allocation last winter fell at some points to 70 per cent of its 1972 sales base but has since increased to 100 per cent of that base under the government's mandatory energy program.

Greenbelt's sole supplier has been BP Oil Corp. and Waldbaum noted that mandatory allocation will expire next February, leaving his co-op and other independent gasoline station operators without a definite source of petroleum. "We've talked with other producers and there are no alternatives," he added.

The negotiations on Irish Sea exploration, Waldbaum said, are typical of the steps necessary to build a permanent supply base.

Submitted as Exhibit A-22 in connection with Fairchild's Motion for Summary Judgment

Supermarket News; Monday, September 9, 1974; Page 41

GREENBELT INKS HALF BLACK

WASHINGTON (FNS) -- Greenbelt Consumer Services chalked up net income of $78,443 in the first six months of this year, compared to a $125,598 net loss in the same period last year.

Eric Waldbaum, president, attributed last year's midyear net loss to "a loss in the co-op supermarket operations."

Sales for the 24 weeks ended July 13 were $21.8 million, compared to over-all sales of $21.3 million in the 1973 period.

But Waldbaum stressed that sales to date from continuing operations mark an increase over last year's sales, which included some $2.2 million from operations which were later discontinued.

Earnings in the first six months were equivalent to 36 cents per share.

Greenbelt operates 12 Consumers and Co-op supermarkets, 8 Scan Contemporary furniture stores, Exval Co-op auto service centers and three Consumers pharmacies. Co-op has more than 38,000 member-shareholders.

APPENDIX D

Excerpt from Deposition of Lloyd M. Schwartz, Washington Bureau Chief of Fairchild Publications (October 11, 1977; p. 105a)

Q. [Counsel for Fairchild] I show you an edition of Supermarket News which has been marked as Plaintiff's Deposition A. I ask you how many pages were in that edition of Supermarket News?

(Whereupon, the witness examined the newspaper.)

A. There were 40 pages in that edition.

Q. Forty pages and could you tell me at what page the article in question appears?

A. It is on -- it is, in effect, buried on Page 35.

Q. Why do you say "buried", Mr. Schwartz?

A. Because it did not have the standing in terms of news importance that many of the other stories in the paper had.

Q. Why did the story that Mr. Waldbaum was being replaced as the notice say [sic], or ousted -- why was that not a first-page story?

A. Because, one, it is a basic routine executive change story.

FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-2064

IN THE

Supreme Court of the United States

October Term, 1979

ERIC WALDBAUM,

Petitioner,

v.

FAIRCHILD PUBLICATIONS, INC.,

Respondent.

BRIEF OF RESPONDENT FAIRCHILD PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: July 28, 1980

Question Presented

The four questions presented by Petitioner do not reflect the conclusions, legal and factual, made by the court below. Accordingly, Respondent restates, pursuant to Rule 34.2, the question presented for review:

> Whether the United States Court of Appeals for the District of Columbia Circuit was correct in its determination that under the facts of this case Petitioner was a public figure for limited purposes within the guidelines of this Court's decision in *Gertz* v. *Robert Welch, Inc.*

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IN THE

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No. 79-2064

ERIC WALDBAUM,

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BRIEF OF RESPONDENT FAIRCHILD PUBLICATIONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judgment and Opinions Below

Petitioner Eric Waldbaum ("Waldbaum") seeks review of a unanimous opinion of the United States Court of Appeals for the District of Columbia Circuit (Tamm, Cir. J.) dated March 31, 1980 (Pet. 1a)[1] which affirmed the memo-

[1] "a" references are to pages in Petitioner's Appendix to his Petition ("Pet.") or to Respondent's Supplementary Appendix ("Resp."), annexed hereto, as indicated. All other references are to pages of the Petition.

randum and order of the United States District Court for the District of Columbia (Corcoran, J.) dated February 15, 1979 (Pet. 26a) granting Respondent Fairchild Publications', Inc. ("Fairchild") motion for summary judgment on the ground that Waldbaum was a "public figure" for limited purposes and absent proof of "actual malice", which Waldbaum admitted he could not show, he could not recover against Fairchild.

Waldbaum enumerates four questions for review. (Pet. 2-4). It is manifest from the tenor of those questions that the only issue is whether the evidence shows that Waldbaum was a "public figure" within the meaning of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Parenthetically, we note here and *infra* that each of Waldbaum's questions is unnecessarily argumentative and either misstates the opinion of the court of appeals and/or mischaracterizes the evidentiary findings of that court and the district court.

Counter Statement of the Case

Fairchild takes strong issue with Waldbaum's presentation of the "facts" in its Statement of the Case. (Pet. 5-17). The Petition ignores material findings of the courts below and mischaracterizes others.

For example, Waldbaum would have this Court believe that the court of appeals reached its conclusion substantially "on the basis of a record" (Pet. 13) that included an affidavit submitted by Eric Waldbaum, 31 newspaper clippings submitted by Fairchild, and the deposition of Lloyd Schwartz, Fairchild's Washington Bureau Chief. (Pet.

10-13). Waldbaum tucks away in a footnote (Pet. 13, n. 7) reference to Eric Waldbaum's deposition despite the fact that his testimony was cited at length by both courts below (Pet. 22a-24a, 46a-48a) and represented important evidence supporting the conclusion that Waldbaum was a public figure. It is disingenuous for Waldbaum to petition this Court for review based upon a truncated statement of facts.[2]

We submit most respectfully that the Petition should be denied pursuant to Rule 21.5 because Waldbaum failed to present, anywhere in its lengthy Petition, a "*concise* statement of the case containing the facts material to the consideration of the questions presented." Rule 21.1(g) (emphasis in original).[3]

If this Court does not deny the Petition for the above reason, we submit most respectfully that the Petition should be denied because it does not present any sufficient reason for review (Rule 17). As we shall show the opinion below follows prior decisions of this Court and the cases relied upon by Waldbaum are clearly distinguishable on their facts. Indeed, in order that counsels' memoranda and the decision below would reflect the most recent thinking of this Court, the briefing schedule in the court of appeals was

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[2] Two leading commentators have stated:

> The Statement is the place for accurately summarizing the relevant facts and the treatment accorded those facts by the courts below. The facts to be set forth, moreover, include more than just those favorable to the petitioner's case. The unfavorable facts, as well as those in dispute (and so labeled), must be given whenever necessary to a proper and full understanding of the case by the Court. R. Stern & E. Grossman, *Supreme Court Practice*, §§6.29, pp. 466-67 (5th ed. 1978).

[3] Previous rules of this Court, effective at the time the Petition was filed, were to the same effect. *See*, Rules 23(4) and 23(1)(e).

adjourned pending this Court's decisions in *Wolston* v. *Reader's Digest Ass'n.*, 443 U.S. 157 (1979) and *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

The courts below found that the parties fundamentally agreed on the facts and that "no genuine dispute as to material facts" existed. (Pet. 2a, 27a). We summarize here the court of appeals' findings.[4]

Waldbaum served as president and chief executive officer of Greenbelt Consumer Services, Inc. ("Greenbelt") from January 1971 to March 1976. Greenbelt was a diversified consumer cooperative that at the end of Waldbaum's tenure had approximately 38,500 members and ranked as the second largest cooperative in the United States. Greenbelt owned retail supermarkets, furniture and gift outlets and automobile service stations. (Pet. 2a).

Prior to joining Greenbelt, Waldbaum was executive vice president of Hill's Supermarkets in New York. There, he was a leading advocate of certain innovative marketing policies including unit-pricing of merchandise and open dating of perishables. (Pet. 22a).

As Greenbelt's president, Waldbaum not only managed the cooperative but also continued to play an active role in setting policies and standards within the supermarket industry and assumed a consumer-oriented posture. He battled traditional practices in the industry. He made Greenbelt a leader in open dating and unit pricing and he

[4] In addition, the Court is respectfully referred to Judge Corcoran's detailed findings made after he reviewed the evidence submitted in connection with Fairchild's motion for summary judgment, including all of the exhibits and Eric Waldbaum's entire deposition. (Pet. 27a-30a, 33a-36a and 45a-50a).

vigorously fought for the introduction of those policies on an industry-wide basis. Waldbaum held numerous meetings with the press and public on topics varying from supermarket practices to energy legislation and fuel allocation. Further, he closed ten of Greenbelt's twenty-two supermarkets, all five of its pharmacies and three of its ten gas stations. These actions received wide publicity and generated considerable comment on both Greenbelt and Waldbaum in trade journals and general interest publications. (Pet. 3a, 22a).

Waldbaum testified that he believed that educating the community at large was one function of a cooperative such as Greenbelt. (Pet. 22a-23a). In this connection, Waldbaum "insisted" that he approve all information for shareholders placed in the *Co-op Consumer,* Greenbelt's monthly newspaper for shareholders, which was also circulated to the trade press. (Pet. 22a).

The court of appeals recognized that Waldbaum embroiled himself in other public controversies. (Pet. 3a, n. 3). The record showed that he actively participated in the public debate about excessive wholesale meat prices by proposing to run an advertisement on behalf of Greenbelt which stated in part, that "when the giants of the industry were feeding you bull, we were feeding you beef." Two Washington, D.C. newspapers refused to print the advertisement. With Waldbaum's prodding Congressional hearings were proposed to investigate the propriety of such refusal. (Resp. 69a). On another front, Waldbaum met with the press to outline a proposal for an extraordinary joint venture between Greenbelt and the Irish Petroleum Cooperative for oil exploration in the Irish Sea, (Resp.

71a), which would have taken Greenbelt far afield from its regular operations.

On March 16, 1976, Greenbelt's board of directors dismissed Waldbaum. *Supermarket News,* a trade publication owned by Fairchild ran an item on Waldbaum's ouster on page 35 of its March 22 issue. The six sentence article stated:

> GREENBELT OUSTS ERIC WALDBAUM
>
> WASHINGTON (FNS)—Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.
>
> Rowland Burnstan will serve as acting chief executive office[r] until a new president is named. Burnstan, an independent management consultant and economist, has worked for various Government agencies and businesses.
>
> Greenbelt said part of his interim job will be to locate a new president for the co-op, which has been losing money the past year and retrenching.
>
> Waldbaum had served as president since 1971. His plans are not known.

On September 27, 1976, Waldbaum initiated this action contending that in fact Greenbelt had not been losing money or retrenching and that this allegedly false report about Greenbelt damaged his reputation as a businessman. Waldbaum sought actual and exemplary damages totalling $75,000.

After discovery, Fairchild moved for summary judgment. It argued that Waldbaum was a public figure and, because he had admitted the absence of "actual malice," he could not recover damages for defamation. Waldbaum

countered that he was not a public figure and thus would have to prove only Fairchild's negligence.

Summary judgment was granted. The district court reviewed all the evidence and found that "[b]ecause of Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position, [Waldbaum was] a public figure for the limited purpose of those issues." (Pet. 50a). That decision was affirmed on appeal. The court of appeals found that because Waldbaum "assume[d] a position of great influence within a specific area and use[d] that influence to advocate and practice controversial policies that substantially affect[ed] others, he bec[ame] a public figure for that debate." (Pet. 25a).

Reasons for Denying the Writ

The United States Court of Appeals for the District of Columbia Circuit correctly held that Eric Waldbaum was a public figure for limited purposes under the guidelines of *Gertz* because he voluntarily injected himself into public controversies and maintained a prominent role in order to influence the resolution of those issues.

Waldbaum's Petition, in a contrived and distorted presentation of the reasoning of the court of appeals, argues for certiorari on the general theory that the opinion of the court "conflicts with the principles" stated in *Gertz, Hutchinson* and *Wolston*. (Pet. 19).

As we show below under the facts of this case the court of appeals' opinion does not conflict with any decision of this Court.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964) this Court held that a public official was prohibited from recovering damages for defamation relating to his official conduct absent proof of "actual malice." Thereafter, the Court extended the *New York Times* standard to "public figures." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967).

Subsequently, in *Gertz* the Court declined to extend the protection afforded by the *New York Times* standard to defamation actions brought by private individuals. *Gertz* identified two ways in which a person will be deemed to have attained "public figure" status:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.[5] More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event they invite attention and comment. (418 U.S. at 345).

The Court described the limited purpose public figure as "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" *id.* at 351. Here, the courts below found that Waldbaum's activities plainly cast him as a public figure for a limited range of issues within the purview of *Gertz*.

---

[5] In the court of appeals, Fairchild conceded that Waldbaum was not a public figure for all purposes.

Public Controversy and Waldbaum's Role

The court of appeals found that public controversies existed. (Pet. 22a).

As relevant here, public controversies existed with respect to manufacturer's secret coding of the shelf life of goods (Resp. 67a, 68a), open dating of perishable foods (Resp. 67a, 68a), unit pricing of goods (Resp. 67a), wholesale prices of meat (Resp. 69a, 70a), competitive advertising (Resp. 69a, 70a), the energy crisis and oil supply (Resp. 71a), and, in general, the viability of consumer cooperatives. (Pet. 22a). Disclosure of secret codes that would reveal the shelf life and home storage life of products and open dating of perishables were resisted by certain major food companies. (Resp. 68a). Advertising by Greenbelt alluding to price-gouging on meat prices by competing supermarkets was rejected by two Washington, D.C. newspapers. (Resp. 69a, 70a). Congressional hearings were proposed to investigate the refusal of two Washington, D.C. newspapers to print Greenbelt's competitive ads (Resp. 69a, 70a) and hearings were also proposed to consider legislation setting up a national open dating program. (Resp. 68a). Adoption of these innovative policies, resisted by manufacturers and retailers, but advocated by Waldbaum, would benefit consumers. By virtue of Greenbelt's unique position and its size in the supermarket industry and Waldbaum's prominent and persuasive campaign for introducing consumer-oriented policies on a national basis, Greenbelt and Waldbaum were at the forefront of the controversies. (Pet. 3a, 22a, 24a, 25a).

It is beyond peradventure that Waldbaum "thrust" himself into the forefront of these public controversies in an

effort to "influence the resolution of the issues involved". *Gertz,* 418 U.S. at 345. Waldbaum was a leading advocate of, indeed initiated, controversial pricing, dating and advertising policies. (Pet. 3a, 22a, 24a). He made Greenbelt the industry flagship in adopting innovative policies and consequently, Greenbelt was often the subject of news reports. (Pet. 22a).

Waldbaum held meetings attended by the press and public where he spoke out on controversial issues including, unit pricing, open dating, energy legislation and fuel allocation. (Resp. 76a-78a). He attempted to place advertisements which reflected his controversial views. (Resp. 69a, 70a). He exercised editorial control over and authored articles for Greenbelt's monthly newspaper. (Pet. 22a). Further, Waldbaum directed that ten of Greenbelt's twenty-two supermarkets, five of its pharmacies and three of ten gas stations be shut down. (Resp. 72a-74a). (Pet. 3a, 21a-25a).

Waldbaum's testimony, cited extensively by both courts below, belies his claim that he did not voluntarily assume a prominent role in the controversies. He testified that he "went out of [his] way to solicit and promote involvement of [Greenbelt's] membership," and that a consumer cooperative, such as Greenbelt had "an obligation to education in the community at large." Waldbaum further testified that he was "responsible for Greenbelt's public image" that he "felt as strongly about the consumer aspects of Greenbelt [as the day-to-day management of the Company], and [he thought] the Coop's livelihood depended on the promulgation of the consumer aspects." In evaluating his position Waldbaum testified that he "really had two full time jobs, not only managing a corporation

in all of its aspects but also this tremendous social outreach." (Pet. 22a-23a and 46a-48a). Thus, the court of appeals was unquestionably correct in finding that because Waldbaum voluntarily assumed a prominent position in the resolution of public controversies he was a public figure "prior to" publication of the article in *Supermarket News. Hutchinson,* 443 U.S. at 135.

Waldbaum relies on *Gertz, Hutchinson* and *Wolston* to support his position that he was not a public figure. (Pet. 19-23). Those cases are clearly distinguishable on their facts.

In *Gertz* the defendant published an article asserting that a murder prosecution against a Chicago police officer was part of a Communist campaign against the police and that testimony during the trial was false. Gertz was an attorney who represented the victim in a civil litigation against the police officer. The article portrayed Gertz as an architect of the "frame-up" of the police officer and labeled Gertz a "Communist-fronter" among other things. Gertz had had only a very minor connection with the criminal trial,[6] the subject of the defamatory article, and never discussed the case with the press. His participation was limited to representing his client during the civil litigation. Gertz did not use his representation of the victim to espouse personal beliefs or convictions.

In *Hutchinson* a research director received federal funds for his study of emotional behavior. A United States Senator believed the grant to Hutchinson to be wasteful and bestowed his "Golden Fleece of the Month Award" upon

[6] Gertz attended the coronor's inquest into the death. 418 U.S. at 326.

the federal agency that made the grant. Previous grants to Hutchinson had not generated more than passing interest from local newspapers in the plaintiff's home town. There was no evidence of controversies as to research grants in general or as to previous grants to Hutchinson, in particular. This Court found that Hutchinson's "activities and public profile [were] much like those of countless members of his profession." 443 U.S. at 135. Hutchinson had not thrust himself into a controversy about the merits of awarding research grants. Indeed, no controversy existed until the "Golden Fleece" award was made.

Finally, in *Wolston* the libel plaintiff was identified in defendant's book as being a Soviet agent in the United States. Sixteen years earlier he was interviewed on numerous occasions by the FBI and appeared before grand juries investigating espionage. On one occasion he failed to respond to a grand jury subpoena and subsequently, after offering to testify, was held in contempt. Although Wolston's failure to appear and citation for contempt attracted media attention, his activities were not "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue." 443 U.S. at 168. He did not otherwise participate in whatever controversy may have existed about espionage.

It is evident from each of these cases that the libel plaintiff never voluntarily thrust himself into a public controversy. Gertz and Wolston played only a minor role in whatever controversy may have existed and certainly there was no evidence that they tried to influence the resolution of issues. Moreover, in *Gertz* and *Hutchinson* no controversy with which the plaintiff could be identified existed until the

defendant created it. Similarly, in *Wolston* a third party initially brought plaintiff into the controversy; sixteen years later the defendant again identified plaintiff with the earlier controversy. Throughout, Wolston did nothing.[7] Conversely, here Waldbaum voluntarily injected himself into the controversies; indeed, he publicly initiated the controversies, maintained a prominent role in them, adopted controversial marketing policies at Greenbelt and met with the press, public and Congressmen to muster support for adoption of such policies on a nationwide basis. Clearly, Waldbaum "invite[d] attention and comment" from the press and public. *Gertz,* 418 U.S. at 345. Waldbaum was not "dragged unwillingly into the controversy." *Wolston,* 443 U.S. at 166.

The allegedly defamatory article reported Walbaum's dismissal and commented on the fortunes of the cooperative under his stewardship. The court of appeals found that such comment received *New York Times* protection because it was germane to Waldbaum's participation in the controversies. (Pet. 20a-21a, 25a). The court was clearly correct. Waldbaum blazed a trail of innovative marketing policies at Greenbelt and publicly advocated that these policies be implemented throughout the supermarket industry. He also generated considerable controversy by directing that significant Greenbelt operations be closed. The financial success of Greenbelt was, of course, directly related to these policy decisions. The newspaper report that Greenbelt had been "losing money the past year and retrenching" was germane to the range of controversial issues that Wald-

[7] "Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson,* 443 U.S. at 135.

baum had initiated and into which he thrust himself and Greenbelt in an attempt to influence policies in the supermarket industry. The court found that placing himself at the vortex of these controversies, Waldbaum:

> assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management, for the commercial success or failure of the actions he was advocating certainly is strong evidence in the public debate over whether other firms should adopt them. (Pet. 25a).

The *Supermarket News* article focused only on the "limited range of issues" for which Waldbaum would be considered a public figure and therefore, was protected under *New York Times. Gertz,* 418 U.S. at 351-52.[8]

Waldbaum's contention that the court of appeals' reasoning would protect "*any* statement" (Pet. 36, emphasis in original) is unsupported by the opinion. In fact, it flatly contradicts the court's unequivocal statement that "[m]isstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection." (Pet. 20a).[9]

Equally frivolous is Waldbaum's argument that under the court of appeal's decision every modern business execu-

[8] In *Gertz* this Court stated:

> It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352.

[9] Waldbaum suggests that under the court's reasoning comment on Waldbaum's "sexual preference" might be germane (Pet. 37). We believe that resort to such patently silly analysis only serves to underscore the complete lack of merit to Waldbaum's request for review.

tive will be found to be a public figure. (Pet. 30). The court found Waldbaum to be a public figure because of his many controversial activities and not because of his executive status. Indeed, the court stated that "[b]eing an executive within a prominent and influential company does not by itself make one a public figure." (Pet. 23a).

Access to Media

This Court has never held, as presented by Waldbaum (Pet. 25), that access to the media is a separate and distinct element of the public figure question. As stated by this Court, access to the media is "one of the accouterments of *having become* a public figure." *Hutchinson,* 443 U.S. at 136 (emphasis added). Waldbaum's position places the cart before the horse.

In any event the court of appeals found that Waldbaum had access to the media and was familiar with press operations. For example, the court found that "Waldbaum had prior dealings with the media" and "had held press conferences." (Pet. 25a). The court also noted that Waldbaum insisted on being *de facto* editor-in-chief of Greenbelt's monthly newspaper. (Pet. 24a). Waldbaum testified that prior to coming to Greenbelt, he frequently communicated with the press, including Fairchild's reporters. (Resp. 81a-83a). In fact, even after Waldbaum was dismissed by Greenbelt, he and Greenbelt were the subjects of news articles. (Resp. 72a-74a). Moreover, Waldbaum testified that he never requested that Fairchild clarify or correct the article.[10] (Resp. 79a-80a). Thus, it is clear that both on the law and the facts Waldbaum's argument is spurious.

[10] We are puzzled how Waldbaum can assert, as he does, that the "court of appeals has indicated that the absence of any opportunity for self-help is irrelevant" (Pet. 26) in light of these facts.

Summary

In sum, the court of appeals broke no new ground in its decision; it merely applied the facts of this case to the guidelines enunciated in *Gertz*. The facts clearly distinguish this case from *Gertz, Hutchinson* and *Wolston*.

As stated by the court of appeals:

> Not everyone who participates in activities that affect the public becomes a public figure. Nevertheless, when one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate. Waldbaum was such a person, and comment on his termination as president and chief executive officer of Greenbelt falls within the range of reports protected under *New York Times*. (Pet. 25a).

Conclusion

By reason of the foregoing Waldbaum's petition for a writ of certiorari should be denied.

Respectfully submitted.

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Counsel for Respondent

On the Brief:
GEOFFREY H. WARD

Dated: July 28, 1980.

APPENDIX

Submitted as Exhibit A-6 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

SUPERMARKET NEWS, MONDAY, JANUARY 4, 1971 operations

this week's new supermarkets

Name of Store	City	Location	Manager	Checkouts	Sq. Ft. Total	(In Area) Selling	Parking Capacity	Features
Food Fair	Plainview, N.Y.	Great Midway Center	James Lusardi	10	34	11	300	Appetizer Section

Executive Changes

Eric Waldbaum New Head at Greenbelt

WASHINGTON (FNS)—Eric Waldbaum has been named president and chief executive officer of Greenbelt Consumer Services, consumer cooperative, here.

The co-op also, canceled its management contract with Checchi & Co., which has run the firm eight years.

Paul G. Nelson, who has been chief executive officer of GCS since last May, continues under contract on the Checchi staff.

Mr. Waldbaum, 32, was with Hill's Supermarkets, Brentwood, N. Y., as executive vice president and assistant to the chairman. Hill's has annual sales of $350 million.

GCS annual sales rose from $22 million to $30 million during eight years under Checchi management. In 1967 the co-op acquired eight Kroger supermarkets here and in 1969 it merged with Peninsula Cooperative Association, Hampton-Newport News, Va., which operated two supermarkets and a furniture store.

The firm operates 22 consumers' supermarkets, five consumers' pharmacies, 10 consumers auto service centers, seven Scan co-op contemporary furniture stores, a direct drug service, and Skinner Tires, tire distributor.

GCS expects Mr. Waldbaum to continue and expand its consumer-oriented programs. He introduced unit pricing at Hill's, a GCS official said, "and led New York chains in withdrawing opposition to unit pricing."

Mr. Waldbaum also favors open dating of perishables and views codes "as a manufacturer's black box which should be opened to consumers," the official continued.

• • •

DETROIT (FNS)—Joseph Gadus, administrative assistant to Bernard Weisberg, president Chatham Supermarkets, has been promoted to manager department of planning services, a new post. He will be responsible for developing plans for Chatham expansion and for planning services for sales, operating and new construction divisions.

Mr. Gadus was with Fernandes Supermarkets, Norton, Mass., as director of store operations and before that was with Peoples Supermarkets, New Bedford, Mass. His successor has not been named.

• • •

WOODBRIDGE, N.J.—Alan Fineberg has resigned as senior vice president, Supermarkets General, effective immediately. SGC operates Pathmark Supermarkets, Rickel's Home Centers, Crown Drug Stores and Steinbach's, Howland's and Hoehschild Kohn & Co. department stores.

• • •

CINCINNATI (FNS)—Henry E. Vonhiedemann has been named manager of advertising for Kroger Co., based here. He succeeds William J. Nanning, who is retiring. Larry H. Hollon succeeds Mr. Vonhiedemann as manager of creative services.

• • •

BUFFALO (FNS)—Samuel P. Devese has joined Twin Fair Buffalo, based discount store chain, as grocery buyer. Twin Fair has supermarkets in six of its Western New York units.

Mr. Devese was a grocery buyer for S.M. Flickinger Co., Buffalo.

CHICAGO—Joseph A. Beauvais has been named director of packaging for Independent Grocers' Alliance.

He succeeds Roy Zimmerman, who has coordinated IGA packaging operations since 1960. Mr. Zimmerman will continue to handle special packaging assignments for IGA until his retirement later on in 1971.

As IGA packaging director, Mr. Beauvais is responsible for the development, procurement, and control of all packaging materials for IGA private label foods and non-foods.

Before joining IGA as assistant packaging director in July, 1970, Mr. Beauvais was packaging buyer for Topco Associates, Skokie, Ill.

Financial Posers Shut Four-Unit Maine Chain

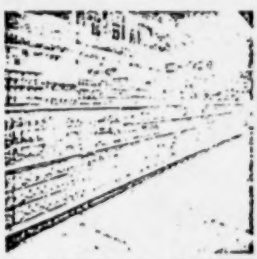
PORTLAND, Me. (FNS)—Warehouse Food Outlets, a four-store chain based here, has been closed.

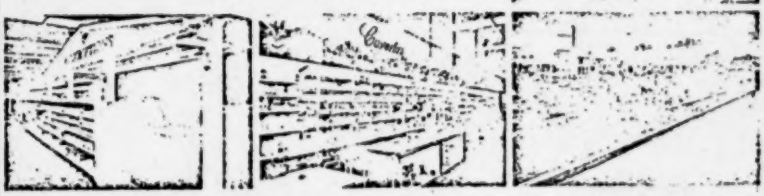
Operations have been terminated until further notice "because of financial problems", according to Jake D. Rigano, owner.

The operation, opened in 1967, has stores in Portland, South Portland, Biddeford and Auburn.

THE ONLY SHELVING SYSTEM GEARED TO THE TOTAL MARKETING CONCEPT

There's a "TOTAL MARKETING" SHELVING SYSTEM that fits every merchandising requirement — groceries... cosmetics...soft goods...hardware... drugs...sporting goods...jewelry... camera equipment...you name it!





AIRWAY "TOTAL MARKETING" SHELVING SYSTEM—YOU NEED IT NOW!

"TM" is just what you need to improve profit yield per sq. ft. of floor space...what you must have now, if you are to achieve maximum storewide profit objectives!

"TM" introduces you to new flexibility, versatility, and more effective store planning and merchandise display; major savings in installation costs — with substantially fewer parts requiring assembly at the store; new simplicity, efficiency, economy in shelving equipment purchasing.

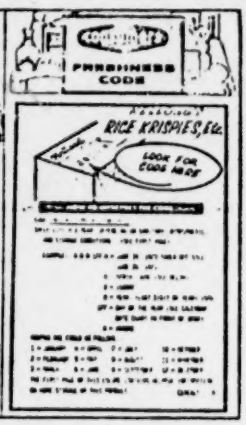
AIRWAY.

AIRWAY PRODUCTS CORP., SCHILLER PARK, ILL. 60176

Civil Act. 76-1810 Ex. A-6

Submitted as Exhibit A-7 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

SUPERMARKET NEWS, MONDAY, MARCH 15, 1971 19



D.C. Chain Provide Code Books

By RICHARD WIGHTMAN

WASHINGTON (FNS)—Consumers Supermarkets last week launched a plan by which shoppers may identify date codes and shelf life of about 2,300 products carried by the 22-store chain.

The program takes the form of "freshness" code books, placed strategically about the stores, which explain the coding symbols on the products, their shelf life and home storage life.

They apply to a wide range of product categories, including the entire meat and dairy departments, cereals, salad dressings, baby foods and snacks.

About 130 manufacturers were approached for the relevant information, and most complied. The chain, which is operated by Greenbelt Consumer Services, identified those firms which it said had either failed to provide any information or supplied only part of the details requested.

Those manufacturers also are identified in the code books. Officials said they included:

Grocery products division, Meister-Brau; Taylor Provisions Co.; Gerber; Heinz; Mead-Johnson; Nabisco; Kretschmer; General Foods; Quaker Oats; General Mills; Sanna Dairies; Pet Milk; Procter & Gamble; Pompeian Oil; Stella D'Oro, and Hunt-Wesson.

Lipton Joins In

The officials said Lipton soup earlier said it was unable to cooperate, but had since indicated it would do so.

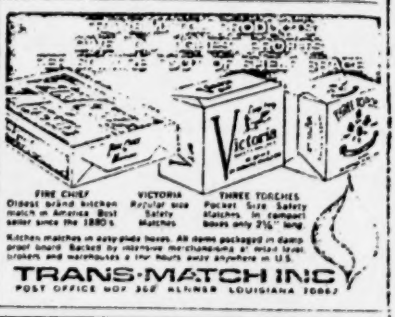
Some of these companies gave code date information but did not disclose shelf life data, the officials added.

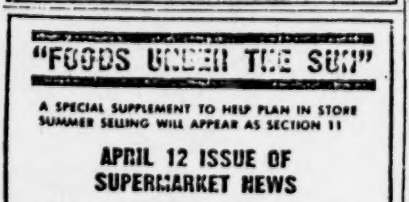
Consumers Supermarkets also disclosed other plans to improve freshness, including a 90-hour limitation on the sale of its own brand of milk, a 24-hour shelf life for its own white bread and three-day or less "pull out" stamps on fresh red meat and poultry. Highly perishable meats will have a 24-hour pull date.

The chain launched its code book plan at a press conference during which Rep. Benjamin Rosenthal (D., N.Y.) promised that he and Rep. Bob Eckhardt (D., Tex.) will soon introduce legislation to set up a national open dating program.

The bill will require food manufacturers and retailers to place a pull date on all packaged perishable foods in a form which consumers can understand immediately.

The cosponsorship by Eckhardt is important for the Bill's future since he is a member of the House Commerce Committee, which would handle the legislation. Eckhardt will thus be in a strong position to push for the measure.





Submitted as Exhibit A-14 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

Washington Pos t - April 7, 1972

D.C. Newspapers Criticized For Refusing Grocery Ad

APR 7 1972

Eric Waldbaum

By Abbott Combes
Washington Post Staff Writer

Rep. Benjamin S. Rosenthal (D-N.Y.), a leading consumer advocate in Congress, yesterday demanded a congressional investigation of the advertising policies of The Washington Post and The Evening Star newspapers.

Rosenthal said he was provoked by the refusal of both newspapers to publish a full-page advertisement for Consumers Supermarkets, a 21-store chain owned by Greenbelt Consumer Services Inc. of Silver Spring, which was brought to his attention yesterday by the firm's president.

The advertisement in question accuses other major supermarket chains in Washington of reacting too slowly to the declining wholesale prices of meat. The advertisement maintains that Consumers lowered its prices as early as March 16, while competitors were doing "precious little."

Rosenthal said it was "incredible" that two major Washington newspapers would deny their readers access to the information contained in the advertisement. We would expect this from a small-town, monopoly-controlled newspaper," he said.

Joseph Lynch, vice president-advertising of The Washington Post, said the advertisement was rejected because it failed to meet the newspaper's standard of "good taste" and because of its policy of not allowing "defamatory" messages regarding other retailers. Jack Schoo, advertising director of The Evening Star, gave similar reasons for rejecting the same ad.

When Congress reconvenes next week, Rosenthal said, he will ask Rep. William S. Moorhead (D-Pa.), chairman of the House subcommittee on freedom of information, to hold hearings on the matter. Further, Rosenthal said, he is scheduled to testify before the Price Commission on Wednesday "and unless this matter is resolved satisfactorily I'm going to tell them about it."

The advertisement began: "When the giants of the food industry were feeding you bull, we were feeding you beef" and displays a picture of a bull.

The advertisement does not mention other supermarkets by name, but said Lynch, it made obvious references to them with a "play on words." Aside from the "giants" quote, the advertisement at one point says, "The big chains did not react. They played it the safe way, the high profit way." There are numerous Giant and Safeway supermarkets in the Washington area.

Greenbelt Consumer Services Inc. is a cooperative venture with more than 36,000 customer-shareholders. In addition to the supermarkets, it also operates pharmacies service stations and Sean furniture stores in the Washington-Baltimore area.

Eric Waldbaum, the president of Greenbelt, said he received a telephone call from The Evening Star on Wednesday morning that informed him that although the ad had appeared in The Star's food section in the first edition, it was being removed from the other four editions.

Submitted as Exhibit A-15 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

FTC to Drop Sterling Charge

WASHINGTON (FNS) — The Federal Trade Commission today ... charges that the two mergers of Sterling Drug Co. and ... Drug Products Co. had anti-competitive effects in the health ... foods ads industry market.

Sterling Drug's headquarters is at 90 Park Ave., New York, and ... Drug was formerly at 605 Park Avenue, New York.

The complaint in the case also had alleged that the mergers would ... competition in the household aerosol deodorizer market.

The FTC said it is dismissing the antitrust complaint because ... with accounts for 2.2 per cent of sales in the markets and Lehn ... only accounted for 0.7 per cent of sales before the mergers.

Kaufelt Indicted on Income Tax

NEWARK, N.J. (FNS) — Stanley P. Kaufelt, president of Mayfair ... Markets, was indicted last week on charges of income tax eva...

The indictment charges that the head of the 22 unit chain evaded ... a total of $75,000 on Federal taxes for the years from 1966 ... 1969.

Attorney Herbert J. Stern said that if Kaufelt were convicted ... on all counts, he could face a maximum sentence of 32 years in jail ... a $64,000 fine.

5 Men Tried On Harlem Charge

NEW YORK (FNS) — The trial ... five men, charged with con... and violation of conflict... interest laws in the promotion ... products in Harlem super... kets got under way last week ... Federal Court.

At its start, food company offi... revealed they had signed con... acts for the promotion of their ... ducts with Coordinated Com... unity Services, a marketing ... sultant firm controlled by the ... fendants.

The Government charges that ... defendants schemed to reap ... rofits from fees paid CCS by ma... food and drink manufac...

The defendants are L. Joseph ... verton, Harlem business agent ... local 338, Retail and Wholesale ... tore Food Employes ... on, his brother, Lawrence J. ... rton, who had been on the ... on's executive board, and ... ward J. Faust, a CCS employee. ... Also: Harlem State Assem... man Nolan E. Jack, president ... the company; Theodore Nolan, ... executive secretary, Associ... Grocers of Harlem, which ... about 80 members and bar... ains collectively with Local 338, ... Harry Rosenblum part owner ... Food Family, a chain of gro... ery stores in Harlem.

The Government contends that ... contracts were made by L. Jo... ph Overton at grocers stores ... supermarkets where the ... membership of the union was em... ployed, and that prominent dis... play of products manufactured by ... the clients was so arranged through ... the efforts of the other defend... ants.

It is charged that these activi... ties were in violation of the Taft-Hartley Act, which makes it a ... crime for a labor organization ... representative to request some... thing of value from an employer ... for members of his union.

Rosenblum and Solomon are ... charged also with conspiring to ... violate provisions of the law ... which forbid the giving of some... thing of value by an employer to a ... labor organization representa... tive. The Overtons are charged ... also with conspiring to accept ... money from Solomon and Rosen... blum.

Obituaries

James H. Palmer

TEMPE, Ariz. — Services were ... held last week for James H. ... Palmer, 65, store manager for ... the past eight years for Smith's Big ... Four Markets, here, until his re... tirement last June.

D.C. Ad Controversy Continues

WASHINGTON (FNS) — The controversy over ... ads from Washington newspapers rejection of ... meat price ads from Consumers Supermarkets ... continued to flare last week.

A full page ad stating Consumers had been first ... to lower meat prices, was rejected by the two news... papers because advertising officials felt the ad was ... in poor taste and disparaged competitor firms.

However, in a series of developments last week, ... Consumers withdrew its normal full page ads in the ... weekly food sections of the Washington Post and ... Evening Star, increased radio ads and then sub... mitted a toned down version of the controversial ad ... that had been used in Friday newspapers.

Consumers Supermarkets is owned by Greenbelt ... Consumers Service.

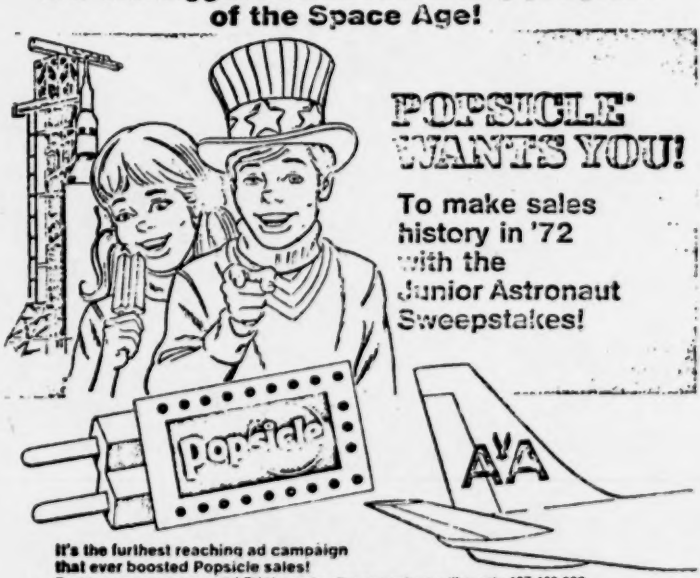
The initial full page ad which stirred controversy ... showed a picture of a bull and included wording ... that "when the plants of the food industry were ... feeding you bull, we were feeding you beef." Adver... tising spokesmen for the newspapers said infer... ences to chain stores such as Giant and Safeway in ... the ad, and the indication that competitors were not ... honest dissuaded the papers from approving the ... ads.

The new ad now reads "while the others of the ... food industry were feeding you words, we were ... feeding you beef."

But the ad also is footnoted that the changes were ... made at the newspaper's request.

During hearings last week on the meat price con... troversy on Capitol Hill, some lawmakers asked for ... an investigation of the two newspapers' action in ... rejecting the ads. A spokesman for one of the pa... pers restated to the panel his newspaper's reason... ing and editorial judgment in rejecting the original ... ad.

It's the biggest sales recruiting program of the Space Age!



POPSICLE WANTS YOU!

To make sales history in '72 with the Junior Astronaut Sweepstakes!

It's the furthest reaching ad campaign that ever boosted Popsicle sales!

Exciting commercials on all 3 TV Networks all summer long will create 167,420,000 household impressions during the height of your selling season. Millions of Sweepstakes Entry Blanks will be printed in TV Guide and popular comic books. Additional millions of padded Entry Blanks and all of the taste-tempting point-of-sale you can use will lift your profits higher than ever before.

It's the most imaginative Popsicle Sweepstakes ever!

7 of your customers will win FREE all expense paid trips for 2 via American Airlines jet to Washington, D.C. from their hometowns. They'll stay at a luxurious hotel for 5 days and 4 nights, visit The National Air and Space Museum Smithsonian Institution, and see the famous points of interest in Washington as guests of Popsicle.

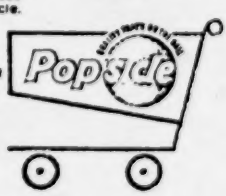
Visit us at the S.M.I. Convention booth #564

Popsicle belongs in your Ice Cream Cabinet

Available in high-profit take-home paks in 50 states and Canada.

Stock up on the one and only Popsicle with the Red Sicle Ball

Sign of the *real* thing!



POPSICLE INDUSTRIES

110 Route 4, Englewood, N.J. 07631
633 No. Baldwin Park Blvd., City of Industry, Calif. 91747
1754 Winthrop Drive, Des Plaines, Ill. 60018
50 Torlake Crescent, Toronto, Ontario, Canada

CIVIL ACT. 76-1810

EX. A-15

Submitted as Exhibit A-21 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

Washington Post - June 4, 1974

Capital Commerce

Co-Op Eyes Oil Venture in

JUN - 4 1974

By William H. Jones
Washington Post Staff Writer

Greenbelt Consumer Services Inc. the Washington area retail cooperative which experienced cutbacks in supplies from regular petroleum suppliers during last winter's energy squeeze, is thinking of taking action to guarantee gasoline availability in the future.

Along with other U.S. cooperatives, Greenbelt is conducting talks with the Irish Petroleum Cooperative that could lead to establishment of a joint venture for oil exploration in the Irish Sea.

A spokesman for Greenbelt—which operates Consumers supermarkets, Scan furniture stores, pharmacies and Exval gas stations—said negotiations currently are taking place here and in Denver with three Irish leaders—Patrick Kelly, general secretary of the Irish Agricultural Organization Society; Denis Murphy, controller of a dairy co-op; and James Hyland, deputy general manager of a food products co-op.

According to Greenbelt, the joint venture would promote oil and natural gas exploration and drilling in the Irish Sea, construction of refineries, and creation of a marketing program for petroleum that is refined.

Greenbelt Consumers currently operates seven gas stations in the D.C. area, down from about a dozen before the energy crisis curtailed supplies. Greenbelt treasurer Paul Mohn said U.S. cooperatives are interested in the venture to assure not only a dependable petroleum supply but also the "lowest, possible marketing cost."

The area cooperative is generally regarded as the largest in the nation, having been formed 35 years ago by early families in the pioneer new town of Greenbelt, Md.

Greenbelt's Scan store chain is the nation's largest importer of Scandinavian furniture, including some products of cooperatives in the Scandinavian countries.

According to co-op president Eric Waldbaum, Greenbelt's allocation last winter fell at some points to 70 per cent of its 1972 sales base but has since increased to 100 per cent of that base under the government's mandatory energy program.

Greenbelt's sole supplier has been BP Oil Corp. and Waldbaum noted that mandatory allocation will expire next February, leaving his co-op and other independent gasoline station operators without a definite source of petroleum. "We've talk with other producers t there are no alternative be added.

The negotiations on Iri Sea exploration, Walbau said, are typical of the ste necessary to build a perma nent supply base.

Presented in N.Y.

Civil Act. 76-1810 Ex. A-21

Exhibit 5
72a

Submitted as Exhibit A-28 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

The Washington Post
BUSINESS & FINANCE
TUESDAY, AUGUST 24, 1976

By Ken Feil—The Washington Post
Greenbelt vice president Donald L. O'Keefe in his Takoma Park office.

Supermarkets Big Losers

Greenbelt Co-Op Is Fighting To Reverse Fast Shrinkage

By Matthew L. Wald
Washington Post Staff Writer

The second-largest consumer cooperative in the country, Greenbelt Consumer Services, Inc., is fighting hard to reverse its record as one of the fastest shrinking institutions of its kind.

The 39-year-old Greenbelt, with an aging membership of about 32,300, has closed 10 of its 22 supermarkets, all of its 3 pharmacies, and 3 of its 10 gas stations in the past 5 years. The co-operative lost $1.5 million from 1970-72, and despite profits of $794,000 in the two years ended last January, it still had a deficit of $360,000 as of that date.

It also is reshuffling its management, and attempting to bring the $7.00 book value per share back up to the par of $10.

Perhaps a more serious indication of poor health, Greenbelt has not paid members "patronage refunds" since 1950. Until that year, the cooperative refunded a portion of profits to members, in proportion to the amount they spent in company stores.

Such discounts to members form the backbone of most cooperatives, but Greenbelt has little prospect of resuming them until 1978.

Greenbelt's biggest loser has been its supermarket chain, much of which was acquired from Kroger Supermarkets in 1967. The purchase gave the cooperative several stores outside its membership area, and most were old or poorly located for any consumers. Stiff competition in the supermarket

See GREENBELT, D11, Col. 4

CIVIL ACT. 76-1810 Ex. A-28

Submitted as Exhibit A-28 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

Greenbelt Co-Op Fights to End Losses

GREENBELT, From D7

business, in addition, has been cruel to the small chain.

The shining star of the operation has been the Scan furniture stores, which have operated profitably through the supermarket's difficulty. But Scan recently discharged 20 employees on suspicion of having stolen $300,000 in furniture over the past few years. Greenbelt is trying to itemize its losses, and collect from its insurance company.

Members also can open share-draft accounts, which amount to interest-bearing checking accounts by purchasing shares in the credit union. Shares may then be transferred by drafts, which merchants or individuals may present to the credit union for cash.

The cooperative also offers inexpensive group travel plans, and is considering attracting new members by buying condominium apartments in Florida and renting them cheaply to Greenbelt members. A prepaid legal plan, which resembles a health-insurance plan in structure, also is under consideration.

But for, those active in Greenbelt, the most important aspect is the democratic control of the cooperative's activities by members. Ownership of voting stock is limited to one share per person, and investment in the cooperative by any individual also is sharply limited.

But Greenbelt shows signs of deterioration on that front, too. In a prospectus for new stock filed with the Securities and Exchange Commission, the cooperative revealed that only 6,800 votes of a possible 33,300 were tallied in the last election.

Another disturbing trend in Greenbelt's membership is age. One director estimated that the age of the average member is 55. Another, noting the paucity of young members, said that Greenbelt has suffered from lack of an active membership campaign in years when it was competing with popular "new wave" co-ops, which operate with minimal facilities (and therefore overhead expenses).

To change its direction, Greenbelt's board of directors decided to seek new management. Eric Walbaum, the chief executive officer since 1971, was offered a contract which "more realistically reflected the goals of the co-op," according to Paul O. Mohn, chairman of the board.

Mohn and others called Waldbaum a qualified, capable businessman. But, according to Bruce D. Palmer, a board member, "his commitment was more toward the commercial aspects of the organization than to the consumer involvement." Another said simply that his "philosophy" was not compatible with a cooperative.

In March, following what the co-operative refers to as the "non-renewal" of Waldbaum's contract, he left the organization. Negotiations on his severance benefits are still going on.

Greenbelt is looking for a new chief executive officer, but has found the field of businessmen with experience in co-ops to be small.

The co-op believes it has reversed its trend of losses and improved its mix of retail outlets. It is expanding its furniture operation, and opened a "Straight from the Crate" fresh meat and vegetables store.

Greenbelt also has some innovative distribution schemes in mind. One is a direct-charge outlet, where items are put on the shelves at wholesale cost. The store is open only to members, who are billed a set fee to cover overhead expenses.

"It would be a much more spartan facility, with no Muzak and shiny glitter," said Wilbur T. Wright Jr., director and treasurer.

But the future of the organization depends, according to several directors, on an infusion of energetic new members, who will further the idea of consumers owning and controlling their retail outlets.

Submitted as Exhibit A-21 to Affidavit of Lloyd Schwartz in Support of Fairchild's Motion for Summary Judgment.

Washington Post - July 3, 1977

Greenbelt: One Co-op Searching for its Past

JUL 3 1977

Once, it was a model of cooperative enterprise, proof that a business, voluntarily organized and owned and controlled by members, could compete against traditionally for-profit-only firms. That was 40 years ago.

In recent times, the Silver Spring-based Greenbelt Consumer Services, Inc.—the second largest consumer cooperative in the country—lost its way.

Some say it grew too big for itself. Others, that the former Greenbelt management team lost sight of their commitment to consumer involvement and pursued dreams of empire instead.

JUL 3 1977

At one time, the Greenbelt cooperative was an impressively large business: 22 supermarkets, 5 pharmacies, 10 gas stations. Today, it is down to 12 supermarkets and 7 gas stations. It had been trying to erase a $1.5 million deficit left over from the 1970-72 period, but last year suffered a loss of $462,000. The book value of its stock has fallen from $10 per share to $5.58 as of January, 1977.

Most serious of all, Greenbelt has not refunded any profits to its membership since 1959. Called "patronage refunds," these returns are a unique feature of cooperatives and distinguish them from other forms of private enterprise. They are generally awarded in proportion to the amount each member spends at the co-op.

Despite its troublesome past, Greenbelt is not about to abandon its 50,500 members. Its chain of Scan furniture stores have been operating profitably throughout the dark years and are continuing to expand. Last year, a tenth Scan store opened for business.

More significantly, the cooperative has filed with the Securities and Exchange Commission for permission to seek [illegible] members.

Much of the guarded optimism among the co-op's staff centers around their new chief executive, Roy Bryant. He was hired at the end of last year from the large and successful Berkeley Co-op, bringing with him 30 years of food industry experience.

Why leave a sunny and profitable operation on the West Coast for something uncertain and less appreciated in the East? Because, say those who know Bryant's mind, co-ops have become a way of life for him and for many in the West, as he thinks they can become for many in the Washington area.

THE SUCCEEDING PAGES CONTAIN EXCERPTS
FROM THE DEPOSITION OF PLAINTIFF ERIC WALDBAUM
(SEPTEMBER 13, 1978)

organization?

A No.

Q Well, who handled matters such as press releases while you were President?

A Well, there were different people at different times. The last one would have been Marjorie Wiener, who was the editor of the Coop newsletter. She was instructed that all press releases which were to be issued in the name of the Cooperative must be cleared with me.

Q And for how long was she doing that?

A Several years. Prior to that, I think W. -- I am not sure of his first initial -- someone by the name of Victor Smith performed that function.

Q But you approved every --

A I approved every press release.

Q Can you tell me approximately how many press releases might be issued in an average month by Greenbelt?

A I would assume less than one, but --

Q What would be the nature of it?

A The nature of it?

Q Yes, of the press release. What would be occasion for a press release?

A Well, we were required to issue financial releases subsequent to the issuance of any financial reports to our shareholders. That was one form of press release.

Q And what might be another type of press release?

A Oh, announcing of a new product --

Q How about closing --

A Announcing of a store opening or closing, announcing of meetings or anything that we thought would be newsworthy that would get publicity for the Coop.

Q What kind of meetings are you referring to?

A Well, we had meetings on the question of energy legislation and fuel allocation, unit pricing, open dating.

Q And who would attend these meetings?

A The press, members of the public.

Q What press in general, what area?

A Trade press and the -- you know, general press. We would send out a list and invite people to the meetings.

Q And what newspapers, for instance, would be on the list?

A She prepared her own list. I was not concerned with that.

Q Newspapers in Virginia, Maryland, Washington?

A Anywhere where we were, plus trade publications would be on our list of people to send press releases to. I would imagine that there were probably 100 publications.

Q Mostly newspapers?

A I can't -- I would say not.

Q And how many members did the Coop have?

A If you want to ask at a point in time, I can give you a specific answer.

Q All right. Well --

A Any time between 1974 and 1976.

Q No, let's say what was the range while you were President, approximately?

(Whereupon, the witness referred to some documents.)

A Well, at the time that I -- approximately the time that I left, there were approximately 38,500 members, and --

(Whereupon, the witness further examined the documents.)

-- and at the time I came, approximately 33,500.

Q These were members of the public?

A I'm sorry, I don't understand your question.

Q Thirty-three thousand members of the public owned

approved by me.

Q Who in the Greenbelt organization while you were there had authority --

A Me.

Q -- to tell any members of the press anything about Greenbelt?

A Me.

Q Just you?

A Yes. There is a reason for that.

Q I understand. Now do you have a recollection of when the article referred to in Count Seven of your complaint was brought to your attention? That is the article published in the Fairchild paper, which is quoted on page 8.

(Whereupon, the witness examined the documents.)

A I can't give you specifics, but it was shortly after the article came out, and I really can't at this time recall the correspondence between the masthead date and the time that it comes out of this publication. It was shortly after it came out.

Q A matter of days?

A That is my recollection.

Q Did you telephone anyone at Fairchild or protest to anyone at Fairchild about this article?

A No, I did not.

Q Do you know if anybody at Greenbelt did?

A I don't know.

Q Now in this action Greenbelt, as you know, or might know, filed an answer to your complaint. Have you had an opportunity to look at that?

MR. TURNBULL: He certainly has not recently

MR. FORMON: Would you show him Greenbelt's answer, please.

(Whereupon, the documents were shown to the witness.)

It is the answer filed, the answer to Counts Five and Eight filed by the firm of Gulpa, Clark, Martel and Donelly, dated November 30, 1976.

MR. TURNBULL: Plaintiff Waldbaum now has it in front of him.

MR. FORMON: All right.

BY MR. FORMON:

Q Now I ask you if you could also look at your complaint to paragraph 29 of your complaint.

Q Can you tell me the nature of the reference?

A I considered it quite favorable.

Q I think I have covered that list. In connection with the Defendant Fairchild Publications, did you have any -- at any time prior to commencement of this action, any conversations or communications with anybody from Fairchild?

A Oh, sure.

Q And with whom?

A I couldn't begin to tell you.

Q You don't know the names of the people?

A No.

Q Well, did you have face to face communications or telephone --

A No, telephone. No, I have had lots of face to face, sure.

Q In your office or where?

A I am not getting your question, obviously. In my offices --

Q Yes, did you meet with Fairchild people?

A In New York I met with them.

Q You said you are not getting my question?

A Your question seems to be awfully broad.

MR. TURNBULL: Fairchild Publications.

THE WITNESS: I am answering you from all of the time of my business career, have I ever had any dealings with Fairchild Publications. Is that what you intend?

MR. FORMON: Well, I hadn't intended it. I didn't realize it.

THE WITNESS: Okay.

BY MR. FORMON:

Q But you did have, you have had dealings with the Fairchild people?

A Yes.

Q And when would you say approximately was the first time?

A Oh, I am sure in the Sixties.

Q And in the Sixties you were with KMS?

A When I was with KMS Bruce, when I was with Hill'n, when I was with Korvette's.

Q All right. Now can you tell me -- I don't want you to go into detail -- the type of matters with which you were in communication with and, if you can, the people with whom you were in communication.

A Usually, you know, a reporter would call up and say,

you know, We heard about thus and so; when can you tell us about it?, and if I were authorized to speak on a subject, I would tell them what I was authorized to say. There were lots of questions from time to time on unit pricing information to computer information to --

Q Unit what?

A Unit pricing information.

Q Pricing information? In what field of the business were you dealing when you talked with Fairchild people? For instance, they published Women's Wear Daily, Daily News Record, Electronic News, Energy User News, Menswear, Suit-Footwear News, Supermarket News.

A I had dealings with people both from Women's Wear Daily and from Supermarket News that I recall. If I saw a complete list of Fairchild Publications, there might be others, but certainly those two.

Q I just gave them to you.

A Was that the complete list?

Q Yes.

A Okay, not Shoes.

Q And Women's Wear Daily, News Record, Electronic News --

A Women's Wear Daily, yes.